SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING CO., INC., PETITIONER

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, ET AL.

No. 367

HURON STEVEDORING CORP., PETITIONER

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, ET AL.

ON WRITS OF CERTICRARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

James Aaron, Albert Alston, James Philip Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel

TOLBERT,

Plaintiffs-Appellants,

against-

BAY RIDGE OPERATING Co., INC.,
Defendant-Appellee,

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY
FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGee, Joseph Short, Alonzo E. Steele, and
Whitfield Toppin,

- Plaintiffs-Appellants,

against

HUBON STEVEDORING CORP.,
Defendant-Appellee.

Statement Under Rule XV.

These companion actions for unpaid overtime, liquidated damages and counsel fee under Section 16 (b) of the Fair Labor Standards Act were compensed in the United States District Court for the Southern District of New York by filing of complaints and service of suminons and complaints as follows:

(a) Civil Action File No. 33-212 commenced under the caption Jeffery M. Addison et al v. Huron Stevedoring Corp., by filing complaint and service on about October 3, 1945. Plaintiffs Blue, Dixon, Elliott, Fleetwood, Fuller, Johnson, McGee, Short, Steele and Toppin were originally included among the named plaintiffs in the Addison case.

Statement Under Rule XV.

(b) Civil Action File No. 33-213 commenced under the caption James Aaron et al v. Bay Ridge Operating Co. Inc., by filing complaint and service on about October 3, 1945. Plaintiffs Aaron, Alston, Brooks, Carrington, Green, Hendrix, Johnson, Roper, Stephens and Tolbert were originally included among the named plaintiffs in the Aaron case.

The answers of defendants Huron and Bay Ridge in the respective actions were filed on about November 19, 1945. Both actions were originally representative in character, that is, plaintiffs were "suing in behalf of themselves and all other present and former employees of defendant similarly situated".

By separate stipulation in each case dated June 17, 1946 and approved by the court that day, the respective captions were amended to add numerous additional parties plaintiff; it was agreed that no further plaintiffs would be added to these cases; and the answers previously filed were made applicable to the additional plaintiffs without need for further pleading (Pl. Exs. 1-2 on trial, omitted from transcript pursuant to stipulation). By additional stipulation in each case dated June 17, 1946 and approved by the court that day, the representative character of the action was terminated in each suit, respectively, as to unnamed persons (Pl. Exs. 3-4 on trial, omitted from transcript to stipulation).

By further stipulation in each case dated June 17, 1946 and approved by the court that day (PLExs. 5-6, respectively) the parties agreed as follows:

(a) To sever out the claims of Leo Blue, Nathaniel Dixon, Christian Elliott, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Joseph Short, Alonzo E. Steel and Whitfield Toppin in Civil Action No. 33-212 against Huron Stevedoring

Statement Under Rule XV.

Corp. and proceed to trial upon their claims, leaving pending upon the docket of the court claims of all other plaintiffs in this case.

(b) To sever out the claims of James Aaron, Albert Alston, James P. Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel Tolbert in Civil Action No. 33-213 against Bay Ridge Operating Co. Inc. and proceed to trial upon their claims, leaving pending upon the docket of the court claims of all other plaintiffs in this case.

The two cases were consolidated for trial by stipulation dated May 14, 1946 and approved by the court on that day and assigned for trial on June 17, 1946.

The parties have stipulated that all of the pleadings may be printed in the transcript of record using the above captions, that is, omitting the names of all plaintiffs except those whose claims were severed out and tried.

Defendants were not at any time arrested nor was bail taken or property attached; no question was referred to a commissioner or commissioners, master or referee.

The consolidated cases were tried together by Hon. Simon H. Rifkind without a jury on June 17, 20, 21, 24 and 25, 1946. Judgment in the respective cases was entered on March 28, 1947 as follows:

(a) In Civil Action No. 33-212, for plaintiffs Christian Elliott—\$1.46 and Joseph Short—\$.70, together with \$263.18 costs; for defendant Huron Stevedoring Corp. dismissing on the merits the claims of plaintiffs. Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Alonzo Steel and Whitfield Toppin, respectively.

(b) In Civil Action No. 33-213, for plaintiffs Albert Alston—\$10.28; James Brooks—\$1.86; Louis Carrington—\$4.56; James Hendrix—\$1.20; Austin Johnson—\$3.20; Carl Roper—\$17.00 and Nathaniel Tolbert—\$36.04, together with \$263.18 costs; for defendant Bay Ridge Operating Co. Inc. dismissing on the merits the claims of plaintiffs James Aaron, Albert Green and Mars Stephens, respectively.

By notices of appeal filed April 17th, 1947, plaintiffs in the respective cases appealed to the United States Circuit Court of Appeals for the Second Circuit. Those plaintiffs against whom judgment was entered on the merits appealed from the judgment and every part thereof; those plaintiffs who recovered something appealed on the ground that the sums they recovered, respectively, were inadequate and did not represent the full amount to which they were respectively entitled.

Plaintiffs in the respective cases on April 7, 1947 moved for a new trial, for the taking of additional testimony to admit into the record certain additional exhibits, and for corrected and amended findings of fact. The Court

on April 14, 1947, denied this motion.

The plaintiffs appeared originally by Max R. Simon, Esq., 225 West 34th Street, New York City, and Goldwater & Flynn, Esqs., 60 East 42nd Street; New York City, and defendants appeared by John F. X. McGohey, Esq., United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York City, John F. Sinnott, Assistant Attorney General, J. Francis Hayden, Special Assistant to the Attorney General and Marvin C. Taylor, Special Attorney, Department of Justice, of Counsel, in both cases. There has been no change of parties other than as indicated above, and no change of attorneys, since the commence ment of the respective actions.

Summons.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action

File No. 33-213

James Aaron, Albert Alston, James Philap Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel Tolbert,

Plaintiffs,

against

BAY RIDGE OPERATING Co., INC.,

Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon 9 Goldwater & Flyan, Esqs., plaintiffs, attorneys, whose address is 60 East 42nd Street, New York 17, N. Y., an answer to the complaint which is hereby served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 4, 1945.

WILLIAM V. CONNELL, Clerk of the Court.

(Seal of Court)

11

Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW, YORK.

[SAME TITLE]

I.

Plaintiffs bring this action for and in behalf of themselves and in behalf of all employees and former employees of defendant similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Pub. 718, 75th Cong.; 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq.), hereinafter referred to as "the Act"

II.

Jurisdiction is conferred upon this Court by Section 41 (8), 29 U. S. C. A. (Judicial Code, Section 24), giving the District Courts of the United States original jurisdiction "of all suits and proceedings arising under any law regulating commerce", without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938.

Ш.

At all times herein mentioned defendant Bay Ridge Operating Co., Inc. has been a corporation organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 34

Whitehall Street, City, County and State of New York, within the jurisdiction of this Court.

IV.

At all times herein mentioned defendant has been engaged in a general stevedoring business in the Port of New York, in connection with which it has made contracts with ship owners and operators to load or discharge at piers and docks cargoes moving in interstate or foreign. commerce from points outside the State of New York to points within the State of New York, or from points 14 within the State of New York to points outside the State of New York, by the use of longshoremen and stevedores employed by defendant and subject to its direction and control.

At all times herein mentioned plaintiffs and other employees similarly situated to plaintiffs have been employed by defendant, subject to its direction and control, as stevedores and longshoremen at piers and docks within the Port of New York, in unloading and discharging cargoes from vessels, moving in interstate or foreign commerce, from points outside the State of New York, and in handling, loading and otherwise working upon cargoes being stowed on board vessels moving in interstate and foreign commerce from points within the State of New York to points outside the State of New York.

In performing these duties, plaintiffs and other employees similarly situated to plaintiffs have been engaged at all times in operations closely, immediately and essentially related to and constituting a part of interstate and foreign trade, commerce and transportation, and in

occupations and processes necessary to the preparation, handling and production for interstate commerce of various goods and commodities, within the meaning of the Act.

VII.

Since October 24, 1938, the same hourly rate of pay was regularly paid by defendant to, and actually received by, plaintiffs and other employees similarly situated to plaintiffs for each and every hour of their employment by defendant in each work week, including all hours worked in excess of the applicable maximum prescribed in Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940 and 40 hours per week subsequent to October 24, 1940).

VIII.

Since October 24, 1938, defendant has at all times failed and refused to compensate plaintiffs and other employees similarly situated to plaintiffs for hours worked in excess of the applicable maximum prescribed in Section 7 of the Act at rates any greater than the same rates which they were regularly and normally paid by defendant for each hour worked during the non-overtime hours (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940).

·IX

Since October 24, 1938 defendant has thus employed the various plaintiffs and other employees similarly situated to plaintiffs in interstate commerce and in the production of goods for interstate commerce for workweeks longer than the applicable maximums prescribed in Sec-

Complaint.

tion 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940) and defendant has failed and refused to compensate plaintiffs and other employees similarly situated to plaintiffs for such employment in excess of the applicable maximum in such workweeks at rates not less than one and one-half times the regular hourly rates of pay at which they were employed, in violation of Section 7 of the Act.

Wherefore plaintiffs pray that judgment be awarded in favor of each of them and in favor of each other employee similarly situated in an amount equal to the difference between the amount each employee has respectively received and the amount each such employee should respectively have recieved if compensated in accordance with the requirements of Section 7 of the Act, together with an equal additional amount in each case as liquidated damages, or a total of approximately \$500,000; and plaintiffs further pray that the Court allow the costs of this action, together with a reasonable attorneys' fee in the sum of \$150,000, to be paid by defendant in accordance

with Section 16 (b) of the Act.

Max R. Simon,

225 West 34th Street,

New York, N. Y.

GOLDWATER & FLYNN,

By Monroe Goldwater,
A Member of the Firm,
60 East 42nd Street,
New York, N. Y.
Attorneys for Plaintiffs.

Answer.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK,

[SAME TITLE]

The defendant, by its attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, answering the complaint of the plaintiffs herein:

- 1. Denies knowledge or information sufficient to form a belief as to the existence of other employees similarly situated to the plaintiffs herein and of the plaintiffs' authority to sue on behalf of all employees and former employees of defendant, similarly situated.
 - 2. Admits the allegations contained in Paragraphs II, III and IV of the complaint.
 - 3. Denies each and every allegation contained in Paragraphs V, VI, VII, VIII and IX of the complaint.
 - FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:
 - 4. That the plaintiffs, during the periods of their employment by the defendant, were not covered by, nor within the scope of, or subject to the terms, provisions and conditions of the Fair Labor Standards Act of 1938.

For a second, separate and complete defense to the cause of action of the complaint the perendant alleges:

5. That the defendant has fully complied with all the provisions of the Fair Labor Standards Act of 1938 as to all of its employees.

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FOR A THIRD, SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

6. That any claim or cause of action on behalf of any plaintiff for any work week which ended prior to a date six years preceding the commencement of this action, is barred by the statute of limitations.

Wherefore, the defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Dated: New York, N. Y., November 19, 1945.

JOHN F. X. McGohey,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

By: Louis Mansdorf,
Assistant United States Attorney,
Office and P. O. Address:
United States Court House,
Foley Square,

Foley Square, Borough of Manhattan,

City of New York.

Summons.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action-File No. 33-212.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY
FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHEEMAN McGee, Joseph Short, Alonzo E. Sterle, and
Whitfield Toppin

Plaintiffs,

against
Hubon Stevedoring Corp.,

Defendant.

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to serve upon Goldwater & Flynn, Esqs., plaintiffs' attorneys, whose address is 60 East 42nd Street, New York 17, N. Y., an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by defact will be taken against you for the relief demanded in the complaint.

Dated: October 4, 1945.

WILLIAM V. CONNELL, Clerk of Court.

(Seal of Court)

Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

T

Plaintiffs bring this action for and in behalf of themselves and in behalf of all employees and former employees of defendant similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June, 25, 1938, c. 676, Pub. 718, 75th Cong.; 52 Stat. 1060; 29 U. S. C. Sec. 201, et seq.), hereinafter referred to as "the Act."

TT.

Jurisdiction is conferred upon this Court by Section 4f (8), 28 U. S. C. A. (Judicial Code, Section 24), giving the District Courts of the United States original jurisdiction of all suits and proceedings arising under any law regulating commerce", without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938.

\ 11

At all times herein mentioned defendant Huron Stevedoring Corp. has been a corporation organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 10 Hanover Square, City, County and State of New York, within the jurisdiction of this Court. 35

Complaint.

IV.

At all times herein mentioned defendant has been engaged in a general stevedoring business in the Port of New York, in connection with which it has made contracts with ship owners and operators to load or discharge at piers and docks cargoes moving in interstate or foreign commerce from points outside the State of New York to points within the State of New York, or from points within the State of New York to points outside the State of New York, by the use of longshoremen and stevedores employed by defendant and subject to its direction and control.

V

At all times herein mentioned plaintiffs and other employees similarly situated to plaintiffs have been employed by defendant, subject to its direction and control, as stevedores and longshoremen at piers and docks within the Port of New York, in the unloading and discharging of cargoes from vessels, moving in interstate or foreign commerce, from points outside the State of New York, and in handling, loading and otherwise working upon cargoes being stowed on board vessels moving in interstate and foreign commerce from points within the State of New York to points outside the State of New York.

VI

In performing these duties, plaintiffs and other employees illarly situated to plaintiffs have been engaged at all times in operations closely, immediately and essentially related to and constituting a part of interstate and foreign trade, commerce and transportation, and in occupations and processes necessary to the preparation, handling and production for interstate commerce of various goods and commodities, within the meaning of the Act.

VII.

Since October 24, 1938, the same hourly rate of pay was regularly paid by defendant to, and actually received by, plaintiffs and other employees similarly situated to plaintiffs for each and every hour of their employment by defendant in each workweek, including all hours worked in excess of the applicable maximum prescribed in Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940).

VIII.

Since October 24, 1938 defendant has at all times failed and refused to compensate plaintiffs and other employees similarly situated to plaintiffs for hours worked in excess of the applicable maximum prescribed in Section 7 of the Act at rates any greater than the same rates which they were regularly and normally paid by defendant for each hour worked during the non-overtime hours (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940).

IX

Since October 24, 1938 defendant has thus employed the various plaintiffs and other employees similarly situated to plaintiffs in interstate commerce and in the production of goods for interstate commerce for workweeks longer than the applicable maximum prescribed in Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940) and defendant has failed and

Complaint.

refused to compensate plaintiffs and other employees similarly situated to plaintiffs for such employment in excess of the applicable maximum in such workweeks at rates not less than one and one-half times the regular hourly rates of pay at which they were employed, in violation of Section 7 of the Act.

WEEREFORE plaintiffs pray that judgment be awarded in favor of each of them and in favor of each other employee similarly situated in an amount equal to the difference between the amount each employee has respectively received and the amount each such employee should respectively have received if compensated in accordance with the requirements of Section 7 of the Act, togetherwith an equal additional amount in each case as liquidated damages, or a total of approximately \$300,000; and plaintiffs further pray that the Court allow the costs of thisaction, together with a reasonable attorneys' fee in the sum of \$100,000, to be paid by defendant in accordance with Section 16 (b) of the Act.

> Max R. Simon, 225 West 34th Street, New York, N. Y.

GOLDWATER & FLYNN.

By MONBOE GOLDWATER, A Member of the Firm, 60 East 42nd Street, New York, N. Y. Attorneys for Plaintiffs.

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAME TITLE

The defendant, by its attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, answering the complaint of the plaintiffs herein:

- 1. Denies knowledge or information sufficient to form a belief as to the existence of other employees similarly situated to the plaintiffs herein and of the plaintiffs' authority to sue on behalf of all employees and former employees of defendant, similarly situated.
- 2. Admits the allegations contained in Paragraphs II, III and IV of the complaint.
- 3. Denies each and every allegation contained in Paragraphs V, VI, VII, VIII and IX of the complaint.

FOR A FIRST SEPARATE AND COMPLETE DEFENSE TO THE CAUSE 4:
OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

4. That the plaintiffs, during the periods of their employment by the defendant, were not covered by, nor within the scope of, or subject to the terms, provisions and conditions of the Fair Labor Standards Act of 1938.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

5. That the defendant has fully complied with all the provisions of the Fair Labor Standards Act of 1938 as to all of its employees.

FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO THE CAUSE OF ACTION OF THE COMPLAINT THE DEFENDANT ALLEGES:

6. That any claim or cause of action on behalf of any plaintiff for any work week which ended prior to a date six years preceding the commencement of this action, is barred by the statute of limitations.

Wherefore, the defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Dated: New York, N. Y., November 19, 1945.

JOHN F. X. McGohey, United States Attorney for the Southern District of New York, Attorney for Defendant.

By: Louis Mansdorf,
Assistant United States Attorney,
Office and P. O. Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

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Stipulation of Consolidation.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civ. 33-212°

Non-Jury Cal. No. 736

LEO BLUE, et al.,

HUBON STEVEDORING CORP.,

Civ. 33-213

Non-Jury Cal. No. 737

JAMES AARON, et al.,

BAY RIDGE OPERATING Co., INC.,

Defendant.

Upon the annexed affidavit of Marvin C. Taylor, and upon the consent of the parties hereto, at is hereby

STIPULATED AND AGREED that the above entitled actions be and the same hereby are consolidated for purposes of trial, and it is

Defendant.

Plaintiffs,

Plaintiffs,

Stipulation of Consolidation.

FURTHER STIPULATED AND AGREED that these cases be set down for trial for June 17, 1946, to be the first cases assigned for trial for that day.

Dated: New York, N. Y., May 14th, 1946.

GOLDWATER & FLYNN, Attorneys for Plaintiffs.

JOHN F. X. McGohey, United States Attorney, Attorney for Defendants.

Cases to be assigned to Judge Rifkind.

Jno. C. Knox, 5/14/46.

JNO. C. KNOX, U. S. D. J.

So Ordered

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Testimony.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Before: Hon. Simon H. Rifkind, District Judge.

New York, June 17, 1946, 10:30 o'clock a. m.

APPEARANCES:

GOLDWATER & FLYNN, Esqrs, and Max R. Simon, Esq., Attorneys for Plaintiffs.

Monroe Goldwater, Esq., James Goldwater, Esq., Max R. SIMON, Esq. and JOSEPH E. O'GRADY, Esq., of Counsel.

JOHN F. X. McGoney, Esq., United States Attorney, for the Government.

MARVIN C. TAYLOR, Esq., Attorney for the Department of 57 Justice, of Counsel.

AFTERNOON SESSION.

Mr. Goldwater: We have reached agreement, your Honor, on a number of stipulations, subject to the Court's approval. I think they will require very little explanation as we go along.

The Court: Fine.

. Mr. Goldwater: The plaintiff will offer most of them. The plaintiff now offers, in the case against Huron Stevedoring Corporation, a stipulation amending the caption of the complaint to add certain parties plaintiff. The stipulation is signed by both parties, and is subject to the Court's approval.

The Court: Very well.

Mr. Goldwater: May I, before we begin marking, your Honor, have the great pleasure of moving the admission, at least for the purposes of this trial, of Mr. Marvin Taylor, of the Attorney General's staff in Washington, who has been assigned this case and who is acting as counsel for the District Attorney for the Southern District of New York, who is the attorney of record.

The Court: The application is granted.

(Stipulation marked Plaintiffs' Exhibit 1.)

Mr. Taylor: I have been most frequently in the position of being introduced to the court by my opponent. It always has a little flicker of amusement about it.

The Court: He may move to withdraw that before the case is over.

Mr. Taylor: Well, I hope he regrets it.

Mr. Goldwater: I shan't regret it, regardless of the outcome of the case, Mr. Taylor.

Mr. Taylor: Thank you.

Mr. Goldwater: I offer now a similar exhibit, amending the caption to add additional parties plaintiff in the case against Bay Ridge Operating Co., Inc., subject to the approval of the Court.

(Marked Plaintiffs' Exhibit 2.)

The Court: Both of these require counter-signature?

Mr. Goldwater: All of the stipulations do.

The Court: All of them do? Mr. Goldwater: Yes, sir.

The Court: Very well. Proceed.

Mr. Taylor: Do I understand that stipulations are being marked as exhibits? The Court: Well, if they be stipulations of evidence

or concessions, it is a convenient thing to have them marked as exhibits.

Mr. Taylor: Very well, sir.

The Court: Because they take the place of evidence.

Mr. Goldwater: I think they should properly be part of the record here, your Honor. I think they become so important and vital a part in any record that it may be probably much better that they be marked as exhibits.

The Court: These particular stipulations that you have now presented are really in the nature of pretrial appli-

cations. Are there any objections?

Mr. Taylor: I have none; I just wanted to make sure we had not overlooked the point.

Mr. Goldwater: I next offer a stipulation in the Huron case to terminate the character of the case as a class action, subject to approval of the Court.

(Marked Plaintiffs' Exhibit 3.)

Mr. Goldwater: The next is a similar stipulation with respect to the Bay Ridge Operating Co. action.

(Marked Plaintiffs' Exhibit 4.)

Mr. Goldwater: Next is a stipulation to sever the actions of certain selected plaintiffs in the Huron case. There are ten plaintiffs selected.

(Marked Plaintiffs' Exhibit 5.)

Mr. Goldwater: Next is a similar stipulation in the Bay Ridge case, with ten selected plaintiffs.

(Marked Plaintiffs' Exhibit 6.)

Colloquy.

Mr. Goldwater: I next offer a stipulation in the Huron case as to employment and payment of the selected plaintiffs. In connection with this stipulation your Honor will find photostatic copies of work schedules showing the weeks worked for each of the ten parties selected, the total number of hours for each, total wages for each and the days worked for each, and we have, for convenience of the Court, attached to each exhibit—I should say Mr. Taylor's office has—the name of the particular plaintiff involved, so that the whole matter would be complete on the single sheet.

The Court: Fine.

Mr. Taylor: And these schedules of hours worked are in a separate folder attached to the exhibit.

(Marked Plaintiffs' Exhibit 7.)

Mr. Goldwater: In connection with Plaintiffs' Exhibit 7, your Honor, I next offer a stipulation, again in the Huron case, which provides that perhaps I should not offer this as a stipulation for the record, your Honor, but simply state to your Honor that in this connection there is a question of certain statements which we wish to be included in the stipuation, Exhibit 7. We have entered into a stipulation to the effect that Mr. Taylor will cause to be investigated and confirmed the facts which we have stated about the case, as we are informed by the plaintiffs, and that if and when such confirmation is obtained, which will be before the conclusion of the defendants' case, that stipulation, Exhibit 7, just introduced, will be amended in the particular that we have requested, and the paragraph will then be added.

The Court: Very well. We don't need to receive it at this time.

Mr. Goldwater: Not at this time.

Now I offer a similar stipulation to Exhibit 7, but as respects the Bay Ridge Operating Company employees.

That is a stipulation as to employment and payment of selected plaintiffs.

(Marked Pfaintiffs' Exhibit 8.)

Mr. Goldwater: In the last filed, Exhibit 8, your Honor, there should be added the week's record for the week of Monday, April 17th, of plaintiff Louis Carrington.

The Court: Why don't you physically attach it?

Mr. Taylor: I think it might very well be inserted in the envelope. The point, your Honor, is that we had prepared this stipulation some time back, before we knew that this particular paper relating to Mr. Carrington was to be desired. So rather than amend the stipulation, we have filed it in its original form and are now adding this pink sheet, which falls within the description material of

The Court: And the defendants to be bound by that

stipulation?

Mr. Taylor: Yes, sir.
Mr. Goldwater: It is now included in the envelope containing all of the material mentioned in the stipulation attached to the exhibit.

I offer now a stipulation in the Huron case, which is entitled "Stipulation of Engagement in Interstate Commerce by certain selected plaintiffs".

(Marked Plaintiffs' Exhibit 9.)

Mr. Goldwater:. I offer a similar exhibit in the Bay Ridge Operating Company case.

(Marked Plaintiffs' Exhibit 10.)

Mr. Goldwater: That is all we have to offer.

Mr. Taylor: May it please the Court, the defendants have several stipulations to offer.

The Court: Are they part of the plaintiffs' case? The only question is whether they should go in at this time.

Mr. Faylor: Perhaps I should state their nature, and then your Honor could say whether you would rather have them now or not. They differ from the stipulations which have just been admitted only in this respect: in each instance the first part of the stipulation concedes the truth of certain facts, or the validity and accuracy of certain documents. It then concludes in each instance with a paragraph in which the defendant reserves all of its rights to object to the admissibility or materiality of the offered material.

The Court: Has that material been offered yet?

Mr. Taylor: No, it has not been offered. They have seen it. They have stipulated what is stated to be in the stipulation.

The Court: As fact?

Mr. Taylor: That is right.

The Court: But your turn for introducing the facts has not yet arrived.

Mr. Taylor: That is true, so that I suppose the question before us now is whether or not you would care to discuss the subject matter of the stipulations and make any decision on the question of admissibility in order that if you would care to—

The Court: Who would offer them? Are you going to offer them?

Mr. Taylor: I am going to offer them when it comes to my case. As I understand it, the plaintiffs' case—

Mr. Goldwater: The plaintiff has presented its prima facie case and rests.

The Court: All right, I will hear you then on your case.

Mr. Taylor: I have here a stipulation entitled, "Stipulation relating to the New York Collective Bargaining Agreements". It recites that the 30 agreements attached,

Colloquy.

by being enclosed in an envelope, are correct copies of all the collective bargaining agreements for the Port of Greater New York, covering the period from May 3, 1916 to date, between the International Longshoremen's Association and the signatury members of the New York Shipping Association, the Deep Water Steamship Lines and Contracting Stevedores of the Port of Greater New York and vicinity. The signatory parties, other than the International Longshoremen's Association, include all members of the New York Shipping Association and the Deep

Water Steamship Lines and of the Contracting Stevedores of the Port of Greater New York. All plaintiffs during the period covered by this suit were members in good standing of the International Longshoremen's Association. Then comes a reservation clause, reading as follows:

"The plaintiff reserves all rights to object to the admissibility or materiality of any of the contracts or awards or facts covered by this stipulation."

The Court: All right, you offer it and let us see whether he is going to object to it. Have you offered it?

Mr. Taylor: I do offer it,

Mr. Goldwater: There is an objection. The objection is based upon the ground that the period is entirely too remote; that the complaint covers a period of employment: which is within recent years, 1943-1944-1945; that the contract between the union and the employing companies is not binding upon these plaintiffs, nor is it so material a factor in the determination of compliance with the Fair Labor Standards Act as to be admissible because of its irrelevancy and immateriality.

The Court: The ruling on relevancy here might well be dispositive of the issues of this case. As a practical matter I am going to receive it. I want you to state your grounds of objections on the record, and they constitute

Colloquy.

in a sense substantive arguments. It will be received and marked.

Mr. Goldwater: I understand, your Honor, that the

(Marked Defendants' Exhibit A.)

on which we reserve only our rights to object on the ground of inadmissibility and immateriality, has in the folder a document which is a copy of certain minutes of the meeting of the managers of Steamship Lines on July 28, 1887. I would not emphasize again the remoteness of the material which Mr. Taylor is presenting to your Honor. I call it to your attention only for this purpose, not to argue about it, that the stipulation refers to the accuracy of contracts. For the purpose of this record and this case we have agreed that these minutes are included under the

The Court: , Very well.

Mr. Goldwater: The stipulation is somewhat inaccurate in its description, because this is not a contract but merely minutes of the steamship company's conference.

general category, the idea being to give your Honor the historical background beginning with these minutes in

Mr. Taylor: There is a nice big long gap, though, from 1887 to 1916, so it is not as formidable as it might/appear.

The Court: All right.

Mr. Taylor: I now offer a stipulation in the Huron case, which is entitled, "Stipulation Relative to Exhibit 7, Paragraph A." Plaintiffs' Exhibit 7, as the clerk has marked it, is the stipulation offered by the plaintiffs relating to the employment and payment practices of the selected plaintiffs employed by the Huron Stevedoring Corporation. In the form in which that material is presented by Exhibit 7 there are certain columns or lines which have been marked with letters rather than with

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1887.

descriptive language, and there is no reference whatsoever in Exhibit 7 to the collective bargaining agreement which was in effect during the period covered by Exhibit 7. The effect and purpose of the stipulation which I am now offering is in the nature of a supplement to Exhibit 7, and recites facts which again are admitted to be true, which simply ties in to Exhibit 7 the specific payroll practices and figures which are set forth in the current collective bafgaining agreement which your Honor has just ad-

mitted.

Mr. Goldwater: The objection is again on the ground that the bargaining agreement is not binding upon these plaintiffs, and it is not material to the issues involved in this action.

The Court : The objection is overruled.

(Marked Defendants' Exhibit B.)

Mr. Taylor: I now offer a stipulation in the Bay Ridge case, which is precisely of the same nature as the one which I just offered in the Huron case, tying in to the stipulation offered by the plaintiffs in this case and entitled "Stipulation Relative to Employment and Payment Practices of Selected Plaintiffs in the Bay Ridge Case"—the terms and conditions of the applicable collective bargaining agreement.

The Court: Same objection; same disposition.

(Marked Defendants' Exhibit C.)

Mr. Taylor: I now offer a statistical table or chart which is entitled "Statistical Analysis of Work Hours of Longshoremen in the Port three month periods indicated."

1923 to 1937. It states for the

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number of man hours worked, the total number of straight time man hours worked, the total number of overtime man hours worked, and then that overtime is split into two parts, one of which is total overtime man hours worked on Saturday afternoons, Sundays and holidays, and the other part is the total overtime man hours and the number of instances involved between 5 p. m. and 8 a. m. exclusive of Sundays and holidays, and that last category is then still further divided, according to whether or not, and if so to what extent, men who worked overtime had worked straight time during the same day. It falls into a group of men who had worked from 6 to 8 hours straight time before working overtime, 4 to 6, 2 to 4, nothing to 2, and ends up with the payroll tables of the number of man hours and instances involved of men who worked only at night, without ever having worked straight time hours during the day.

The stipulation, which the parties have signed, and which is attached to this table, read as follows:

"It is hereby stipulated that the parties, through their undersigned attorneys of record, subject to the approval of this Court, that the accuracy of the figures recorded on the attached statistical table is admitted. The plaintiffs in all other respects fully reserve all their rights to object to the admissibility of the attached table, on the ground that it is incompetent, irrelevant and immaterial, except that no objection will be made on the basis of the best evidence rule or the rule against hearsay evidence."

The Court: It boils down to this, what is probably plaintiffs' position. This covers a period not embraced within the issues, and on that ground alone it probably would be irrelevant. However, as I see it, it is a little bit different. Assuming that this was not in evidence,

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but that this table were published in some well-recognized statistical study such as the Statistical Analysis covered by the Department of Commerce, I suppose I would be free to have access to that for general economic information, if I was going to bring to bear upon the decision of this case general economic data. So what you have done is substituted the imprimatur of your stipulation in lieu of the standing and reputation of the authors, and I therefore receive it in that sense. It is really brief material, father than evidentiary material, for which you have,

however, to acknowledge the quality of the material.

Mr. Goldwater: I think your Honor has correctly stated our position. The objection primarily, of course, is to the fact that the material covers a period of time which is not embraced within the plaintiffs' claims here, that there is a vast difference between the conditions which are described in this exhibit between 1923 and 1937 and 1943-1944-1945, and that for that reason it is not relevant or material to the issues as your Honor has pre-

sented them.

The Court: I will receive it for the narrow purposes for which I have indicated.

(Marked Defendants' Exhibit D.)

Mr. Taylor: I next offer a statistical tabulation entitled, "Statistical Analysis of Work Hours of Longshoremen in the Port of New York, from the payroll period nearest November 1, 1938 to the payroll period nearest August 31, 1939." There is attached to this tabulation a stipulation in identical language with the one attached to the exhibit which your Honor has just admitted. The classification of material is precisely the same. It merely covers the period beginning with the first payroll after the enactment of the Fair Labor Standards Act, and runs

down to the payroll nearest August 31, 1939, which was selected because we tried to cover the longest period after the enactment of the Act and prior to the incidence of the War.

The Court: It will be received for the same limited purpose, over the same objection.

(Marked Defendants' Exhibit E.)

Mr. Taylor: You will see in the lefthand column a series of letters. That is the column headed by the caption "Company". I have supplied plaintiffs' counsel with a list of the names of the 17 companies whose code references are set forth in that column. I have not stated to them which code designations go with which company, except as to the two which are involved in this suit.

Now "KA" is the code reference for the Huron Stevedoring Corporation, and "OA" is the code reference for the Bay Ridge Operating Company. The final statistical exhibit which I would like to offer, and which has a similar stipulation attached to it, is entitled, "Relationship of Contractual Overtime to Wage and Hour Overtime in the work of Longshoremen in the Port of New York," from the payroll period nearest November 1, 1938 to the payroll period nearest August 31, 1939. It is based upon reports from the same 17 companies whose code numbers are set forth in the exhibit just admitted. It covers the same period. It differs only in that it presents a different phase of information.

The Court: Same objection and same disposition. It will be received for the same limited purpose.

(Marked Defendants' Exhibit F.)

Mr. Taylor: There is one further matter that perhaps should be called to the Court's attention now, with respect

to which the parties are in agreement, and that is as to the steps which should be taken upon the handing down of your Honor's judgment or opinion. We have agreed, subject to your Honor's approval, that the burden of applying to the 20 selected plaintiffs the principles which you may set forth, should not fall upon your Honor; that when you have notified us by an opinion, or however it may be, of the applicable principles, we will then informally, out of court, apply those principles to the actual experience of 20 selected plaintiffs, returning to your Honor with an agreed set of figure for which actual money judgments can be entered. expect we will be able to agree. It is understood between us that if we run

we will come back to you, with your approval.

The Court: Of course.

Mr. Goldwater: It may become important, although neither of us hopes so, that a Special Master may be appointed, but I think we will be able to avoid that. Neither of us is looking for a picayune advantage.

into any difficulties in interpreting your directions, why,

The Court: I understand you will save me the necessity of doing the bookkeeping. I think that is a convenient arrangement.

Mr. Taylor: That concludes all of the testimony I have to offer today. My understanding is we are to resume on Thursday next.

The Court: Yes.

(Adjourned to Thursday, June 20, 1946, at 10:30 a. m.)

New York, June 20, 1946: 10:30 o'clock, a. m.

Trial Resumed.

Mr. Taylor: I have some witnesses to be sworn, your Honor. Do you want them all sworn at the same time? The Court: No, each one in turn.

ANDREW D. WARWICK, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Warwick? A. 644 Paramus Road, Paramus, New Jersey.

Q. What is your business! A. My business is a contracting stevedore.

Q. What is the name of your company! A. T. Hogan & Sons, Incorporated.

Q. They are stevedores here in the port of Greater New York! A. They are stevedores in the port of Greater New York, yes.

Q. Roughly how long has T. Hogan & Sons been doing stevedoring here in New York? A. About 75 years.

Q. What is your position with the company? A. I ampresident of T. Hogan & Sons.

Q. Will you tell the Court, please, what your experience has been along the waterfront and in the stevedoring business? A. I came in the stevedoring business 1921. Up until March of 1942 I was actively engaged in stevedoring with T. Hogan & Sons. In March of 1942 I went to Washington as a consultant for the War Department in connection with stevedoring, Army stevedoring matters. I was commissioned a major in the army and served until November of 1945, having technical jurisdiction over the

army loading of vessels in the United States. After my discharge from the army I returned to T. Hogan & Sons as president of that company.

Q. Are T. Hogan & Sons Company a signatory party to the Collective Bargaining Agreement here in the port of New York with the International Longshoremen's Associa-

tion! A. Yes, they are.

Q. And in particular they are signatories of the agreement which I now would like to show you. I show you a little booklet bound in a grey cover, entitled "Agreement Negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of Greater New York and Vicinity, Effective October 1, 1943."

Your company was a signatory party of the agreement of which this is a printed copy? A. Yes, we were.

The Court: What exhibit is that a part of?
Mr. Taylor: I am sorry, sir. That is part of
Defendants' Exhibit A.

Mr. Goldwater: Defendants' Exhibit A, your Honor, is the group of all the contracts.

The Court: Very well.

Mr. Taylor: And I call the Court's attention to the final paragraph, found on page 15 of the booklet, which says:

"This agreement shall be effective from October 1, 1943 to September 30, 1945",

and I think we can agree for the record can't we, Mr. Goldwater, that the claims of the plaintiffs in suit before your Honor fall in that period.

The Court: Well, whatever it is, it is.

Mr. Goldwater: I will say the major part of it is included, practically all, within that period.

Q. I assume, Colonel Warwick, that as a result of your long service with Hogan and the wartime service which

you have described, it is fair for us all to assume that you are familiar with conditions all through the port of Greater New York with respect to longshoring and stevedoring? A. Yes, that is correct.

Q. That is, you know as one in your position and with your experience would know, the general conditions and practices which prevail in that industry? A. Yes.

Q. And can you say whether or not this agreement to which I have just referred was recognized and followed throughout the port of New York? A. Yes, it was.

Q. And in the same way the agreements which preceded it, year by year, or, in some instances, for two-year periods, were similarly recognized and had portwide application? A. Yes, they were.

Q. Well now, I think it might be helpful to his Honor if I asked you a few questions in the nature of background material, so that we may be familiar with some of the lingo of your trade, and let the Court understand how longshoring and stevedoring are done. Perhaps I would ask you first to describe a shape, what a shape is. A. A shape is a gathering of men outside of a pier, at any pier throughout the port, at regular intervals; for instance, at 6:55 in the morning, at 12:55 in the afternoon, and, years ago, at 6:55 at night. The men gathered outside the pier at those hours, and a man employed by the company went out in the group and selected the number of men that he wanted for the particular job, segregating the men into three categories; usually the man picks out the sailors to work on the deck, the hold men for the hold.

Q. Is that the only method of employment of longshoremen that you have any knowledge of here in this port!

A. That is correct, in the port of New York.

By the Court:

and the dock men for the dock.

Q. Does that mean, Colonel, that if a man appears at 6:55 at a particular dock and stands in shape and is not

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selected, he won't be able to work for the next eight hours because then it is too late for him to go to any other dock to try to get a job! A. No, that is not quite correct. The piers, for example, in the Chelsea section, are so close to each other that a man can walk from one shape to another and be in time; if he misses the shape at one pier, he often catches the shape at the next pier, particularly if they are hiring a large group of men.

I would like to correct; I think I said 6:55 in the morning. It is 7:55.

By Mr. Taylor:

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Q. Yes. The men who come on are just such individual men as may want to work that day if they are employed? A. That is correct.

Q. They have no regularity of employment, in the sense that a factory worker might have it: they come down there, offer themselves for employment in the shape and either get it or not, as the event works out? A. That is right.

The Court: They are all members of the I. L. A., or is that not required?

The Witness: Well, they are all members of the I. L. A., I would say, regular men; but in the event that the union men are not available, we have the right to hire men who are not members who may be in the shape.

Thé Court: I see.

Mr. Taylor: I might in that connection read briefly from this agreement which we have been referring to. It says:

"Members of the party of the second part (which is the I. L. A.) shall have all of the work pertaining to the rigging up of ships and the coaling of same

and the discharging and loading of all cargoes, including mail, ship's stores and baggage. When the parties of second part cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the party of the first part may employ such other men as are available."

That is on page 2 of the agreement.

Q. Imagining a man who has been picked out of the shape by the foreman stevedore, just sort of carry him on from there and tell about issuing him the brass check, if you will, please! A. Well, the man is issued a check usually as he goes through the gate, and he is assigned to his place of work, either in the hold, on the deck or the dock, whatever it happens to be, and he proceeds to the ship, if there are two ships on the pier he proceeds to the ship that has been designated for him to work on. The gangs then are usually—the men are usually assembled into gangs, that is No. 1 gang, No. 2 gang, after they come in, to identify the hatch. The ships have six, seven and in some cases more hatches, to identify the hatch so that the man can go back to that place when he returns on a subsequent shift.

Q. How long does a man hold his brass check? A. One week. The brass check is held for one week, for the week's pay.

By the Court:

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Q. Even though he may only work one day? A. Even though he may only work one day or one hour, he still has a brass check for that hour.

Q. And if he is employed a second day, does he get a new check? A. No, he works on the same check.

Q. Even though he may be on a different ship, or only on the same ship? A. Well, the practice may vary. We

keep one check for the man, regardless of the number of ships he worked on.

- Q. The check had a number? A. The check had a number.
- Q. You identify him by that number on your work sheet? A. That is correct. . .
- Q. And your foremen keep track of his time by his number on his brass check! A. Well, the foremen keep
- Q. Or the timekeeper? A. The timekeeper keeps track of it.

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By Mr. Taylor:

- Q. Well, it is true, is it not, that although the records through most of the week are kept only by the man's brass check number, that at the time of his first employment in any work week, in other words at the time when he is first issued a brass check in a particular week, the timekeeper also makes a notation of his company number or his port number! A. Or his social security number.
- Q. Will you explain the port numbers and company numbers to the Court, please! A. Well, in some instances they have a port number, port identification; in some cases 111 they have a company identification; during the war they had a Coast Guard identification,

The Court: Some system of identifying the men! The Witness: Some system of identifying the men.

Q. In other words, to connect up the time record according to the brass check number with the individual man, for the purposes of payment, taxes, social security, war bond purchases and things of that character? That is correct.

Q. Now the work week covers what period? A. The work week covers from 7 o'clock Monday morning to the following Monday.

Q. And when is payday! A. Payday is usually on

Friday, Friday or Saturday.

- Q. And is it true that at the time the man is paid on Friday for the week ending the previous Monday, he then surrenders his brass check number for the pay week, upon presentation of his identification card? A. That is correct.
- Q. Will you please tell us what a header is, and a gangwayman and an assistant foreman? A. A header is usually the lead man on either side of the hold gang. In other words, the hold gang is usually divided into two parts. One half of the hold gang works on the offshore of the vessel, offshore side; the other half works on the inshore side. The header is the man in charge of these small groups, usually four men in each group.

Q. How are headers selected? A. Headers are usually selected for their experience, for their ability to handle the small group of men, and their general knowledge of

stevedoring and stowing.

Q. Are they men who are regularly employed by stevedoring companies in that capacity, or are they men who are selected from the men who come out of the shape in order to act as header for the time being? A. They are men selected from the men that come out of the shape.

Q. And is it true that a man may start in or work for a period as a general longshoreman, and then work for a period as a header, and then perhaps during the same week go back to working as a general longshoreman! A. Oh, yes, that is very possible.

Q. And how about gangwaymen? A. Gangwaymen are usually the men in charge of the deck gang, the gang running the winches and handling the falls. He is sort

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of a lead man of that small group on deck, four men or usually four men. He more or less directs the activities of the deck gang in the absence of the hatch foreman or under the orders of the hatch foreman.

Q. And is he like a header in the sense that he is a general longshoreman temporarily assigned to that particular type of additional work? A. Yes, that is correct.

O. What does the expression "assistant foreman"

mean? A. Well, assistant foreman, I think in some cases various companies use "assistant foreman", the title "assistant foreman" in various ways. That may mean assistant foreman to the hatch foreman, or it may mean assistant foreman to the ship's head foreman looking after the ship.

By the Court:

Q. What does the term "assistant foreman" mean in the wide sense it is used here in the I. L. A. agreement? A. The assistant foreman in the I. L. agreement I think refers to the foreman on the dock, or dock foreman, as the case may be.

Q. If I remember correctly, one I. L. A. agreement that I once saw had a slightly higher rate of pay for assistant

foreman.

Mr. Taylor: I was coming to that.

By Mr. Taylor .:

Q. Is it true, and has it been true for many years in this port, that longshoremen working temporarily as headers, gangwaymen or assistant foremen received an additional sum of money beyond what they would be paid when working as general longshoremen? A. Yes, that is correct, they do get additional compensation for the additional responsibility.

Q. And are those additional amounts commonly referred to as differentials or header allowances, or what is the expression? A. We used to call them "heading money" or "gangwaymen money" or "gangwaymen's pay" or "differential"? There are a number of expressions.

Q. How much are they, Colonel? A. They are 5 cents an hour for the headers and gangwaymen, and I don't just recall offhand what they are for assistant foreman.

By the Court:

Q. What is a "snapper"? A. Well, a snapper is not usually used in stevedoring. I think that is used in shipyards.

Q. Not, in the stevedoring business? A. No. I have heard the term used many times, but we have never used

it ourselves. We refer to them as this and that.

Q. I had a long trial here once in which the question was whether a snapper was an assistant foreman. They were all referred to as snappers. A. Well, I have heard of it in shipyards many times.

Q. No, this was on a stevedoring job in the port of Philadelphia. A. Oh, that is quite possible; that is quite possible, because they do in various ports use a different nomenclature than that we use in New York.

The Court: All right.

Mr. Taylor: Now coming back for a moment to the matter of shaping, I have found that the Collective Bargaining Agreement contains various provisions with respect to shaping and also with respect to the times of employment for which a man can be hired at any particular shape, and I would like to call this to your Honor's attention and then ask the witness something about it.

Under paragraph 8, on page 6, it is provided-Mr. Goldwater: Still referring to the October. 1st—effective October 1, 1943, agreement?

Mr. Taylor: Yes. For simplification of the record, let us have it understood that if I refer to the Collective Bargaining Agreement without any further designation, I am referring to the one effective October 1, 1943, and in effect until September 30, 1945.

Mr. Goldwater: Very well.

Mr. Taylor. Now on page 6 of that agreement, 122

paragraph 8(a) reads:

"Shaping Time. Shape at 7.55 a. m., 12.55 p. m. and 6:55 p. m. Men may be ordered out, however, for any other hour, provided that those wanted between the hours of 8 a m. and 12 noon shall receive notice at 7.55 a. m. shape; those wanted between the hours of 1 p. m. and 5 p. m. or at 5 p. m. or at 6 p. m., shall receive notice at the 12:55 p. m. shape and those wanted for 7 p. m. or later shall receive notice at the 6.55 p. m. shape.

"When men are ordered out for work beginning Sunday morning, they shall be hired on regular gangs at 12 noon on the Saturday preceding. Men wanted for work on a ship arriving on any of the holidays referred to in Clause 2(c) may be shaped only once on the holiday, at 7.55 a. m., at which time they shall receive definite orders whether or not they will be employed during the day or night."

On page 8 of this Collective Bargaining Agreement, paragraph (g) reads as follows:

> "When men who have been employed on the premises in the afternoon are re-employed after 7 p. m., they shall receive a minimum of 2 hours pay.

regardless of weather conditions, unless the ship or hatch on which the men are employed completes discharging or loading in less time. When men who have not been employed on the premises in the afternoon are employed at 5 p. m. or at 6 p. m., they shall receive a minimum of 4 hours pay, such pay to commence at the hour ordered out, whether work begins then or later, except that when work is prevented by weather conditions they shall receive a minimum of 2 hours pay.

"When men who have not been employed on the premises in the afternoon are employed at 7 p. m. or later, they shall receive a minimum of 4 hours pay, such pay to commence at 7 p. m., whether work begins then or later, except that when work is prevented by weather conditions they shall receive a minimum of 2 hours pay."

By Mr. Taylor:

Q. Can you explain to u., Colonel Warwick, the significance and purpose of those provisions which I last read, particularly those which require that you cannot order men to come to work for the first time at night unless you are prepared to pay them or work them a minimum of four hours! Why is that in the agreement! A. Well, the regular working week of a longshoreman is 44 hours. The regular shaping time in the morning is 7.55. We hire the men at 8 o'clock—to go to work at 8 o'clock, or we order them out for 10 o'clock. It is quite possible that the ship starting, the hour of starting may be 10 o'clock, and take them in at 10 o'clock. Likewise, at the 1 o'clock shape, or 12.55 shape, rather, we either hire the men at that time or we order them at 3 o'clock or 2 o'clock, whichever the case might be. The 7.55 shape, or the 6.55 shape, rather, at night, is the same

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thing. . We order the men, or rather we shape the men, and we give the men orders for that night, the reason being that the uncertainty of the business gives the contractors an opportunity to determine within a very short time whether or not they want the men for employment at that time.

By the Court:

Q. Well, de I understand that the object of these clauses is to have definite stated intervals at which the men know that they can gather for purposes of employment, and 128 that if you hire them, you can't hire them for trivial. periods, you have to take them for a period of time which will at least justify his coming down and shaping up and going home; otherwise he might be chasing around all day and never earn a dime? A. That is correct.

By Mr. Taylor:

Q. And with respect to the clauses that I read last of all, if you are asking them to work in the night time you can't do it unless they get at least four hours pay; in other words, you cannot bring them out at night for just a couple of hours if they have not been working during the day! A. The reason for that is that the men have objected very strongly to working at night, they want to work during the daylight hours or the regular working hours, and at 7 o'clock, if they come out, they feel they are entitled to more than they would if they came out during the regular hours of morning or afternoon.

By the Court:

Q. So this is intended to discourage. A. This is intended to discourage working hours other than regular working hours.

Q. You said the regular work week is 44 hours. Can you explain to me just what you mean by those words! A. Well, so long as I can remember there has always been a reluctance on the part of both the men and the employers and the steamship companies to work other than hours of the regular work day, daylight hours for work, for a number of reasons.

Q. I understand that, but what do you mean by the words "regular work week is 44 hours"? A. Well, it has always been my understanding, and I am sure the understanding of many, that the regular work week, we all refer to the agreement as the regular work hours of

Q. Is that because the so-called daylight shift, extended over the period of time from Monday moraing to Saturday noon, adds up to 44 hours; is that what you mean? A. That is correct, yes. That is normal working. We always considered it as the normal working day, the same as the office employees consider 9 to 5, or the longshoremen consider 8 to 5 and a half-day Saturday.

Q. And that was the 44 hours? A. As the normal working time.

132 By Mr. Taylor:

44 hours.

Q. Will you be kind enough to tell us Colonel Warwick, a little bit about how the ship is worked, that is, how you get the cargo out of the vessel, the sort of tackle that you use?

The Court: Before you go into that, may I ask one more question?

Mr. Taylor: Certainly, sir.

By the Court:

Q. Does it or does it not develop as a practice that any particular stevedoring company, such as T. Hogan &

Son: or Pershing-Hudson or any of the others that are down the street, that over the years they develop a gang of people who work for them rather than for other stevedores, and that those men shape up at their particular piers and that the foreman, or whoever it is for the company who picks these men, knows these men and hires them regularly in preference to strangers who may shape up in the gang. A. Yes, I think that is true. There are a number of men who follow the employment of one contractor or one steamship company, or they may vary in one area, like the Chelsea area; the men may work—I recall we had alternate sailings to Liverpool with the Cunard Line, and men worked on the Cunard Line one week and then worked for us the other week, they confined themselves to that Chelsea area.

Q. So that you will find, if you look on your payroll, that the same names recur and recur and recur? A. Yes, I think that is—I would not say quite that regularly. Q. It is not quite that way? A. I think you come to

Q. It is not quite that way! A. I think you come to recognize people, because you see them quite often, but they do drift around to suit themselves.

Q. But are there men who, say, do work exclusively for T. Hogan & Sons for many years? A. There are a number of men I would not say have worked exclusively, but have worked very constantly for us.

By Mr. Taylor:

Q. And is that true as to entire gangs, Colonel Warwick? A. Gangs?

Q. Yes; I mean you have said that there are certain men who may be known, who like to work for this company or that company, or in this area or that area; what I am now asking you is whether or not it is true that there are groups constituting a gang who, as an entire group or gang are repeatedly and recurrently and regu-

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do change them about. They may shift from one gang or another, but there is a certain group of men that follow a steamship company or contracting stevedore.

Q. Well would they necessarily be in the same gang, one day and the same gang another day? A. Well, sometimes they stay in the same gang for quite a while, and then they change it or we change them about for some reason or other. Men drop out of a gang and we fill in, change the men about and fill in the men that drop out of the gang, and that sort of thing.

By the Court:

Q. What I am trying to ascertain is this, that while it is true that there is a brand new hiring, as you say, at every shape, that that is like a brand new muster in the army every day, but you don't get a brand new army every day. A. No, that is quite right.

Q. Actually the man in charge of an operation picks himself out 50 or 60 men, if that is what he needs, and he will more or less keep the same 50 or 60 men for the entire operation, and then if he gets another one after

entire operation, and then if he gets another one after that, he may, if the same men show up, keep the same gang all over again. A. A lot depends on the locality. We form new gangs on one of our piers every week; in other words, we do not keep regular gangs, we change

the men around, hire men as individuals and make them into gangs, or maybe 50 men work the first week in the month, and 45 of that group work the second week, but in the third week there may be only 30 of that gang there, and we do change them around.

The Court: I see. All right.

By Mr. Taylor:

Q. Now will you tell us a little bit how you work a ship and what a long hatch is, or a short hatch, some-

thing about hoists and tackle and movable equipment and so on. A. Well, ships are rigged pretty much the same. There are new innovations that have come into use in the last 10 or 15 years, but usually there is a boom and a winch to hoist the cargo out. A hatch may have up to six or eight booms per hatch; some of the coastal ships, the liberty ships for example, had two winches and two booms at each hatch, with the exception of the No. 2 hatch, where we had a heavy lift boom in addition to the two light booms, and at No. 4 we had a heavy lift boom. The newer ships, or rather, to identify the ships, the C-2s, have come out with double rigging in each hatch, so that we can put an additional gang in the hatch, instead of working one gang you can work two gangs now, and the cargo is hoisted out with two falls together and slung out and landed on the dock.

A long hatch usually is a hatch that is larger in capacity than the other hatches of the ship. For instance, the liberty ship a No. 2 hatch was one-third of the total capacity of the ship, and the ship had five hatches.

Q. Isn't the expression 'long hatch' also used with reference to the time that it will take to get the cargo out of it! A. Well, the oubic capacity being larger, necessarily it makes it that the cargo and the hours in the hatch would be longer.

Q. That certainly would affect it, but it would also be affected by whether you are handling, we will say, crated automobiles or innumerable small packages? A. That is correct.

Q. So that all these ideas are embraced in the expression "long hatch", meaning a hatch which, for one reason or another, may take longer to unload than other hatches in the ship! A. That is correct.

Q. Will you tell us about movable hoists or auxiliary hoists or equipment, that is equipment other than that which the vessel carries with her? A. Well, some piers

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in the port of New York are equipped with temporary movable winches, and the winch can be placed in any position, meaning usually on the upper level, although there are some piers that have movable winches on the lower level. The piers are also equipped with what we call a dock span, which is nothing more or less than a heavy I-beam to which we secure blocks used for the hoisting of—to which we run the fall for the hoisting of cargo. By the use of movable or auxiliary winches and the dock span, we are able to put more gangs in the ship than if we used the ship's equipment.

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Q. What relation, if any, have they to the matter of the amount of work done during the normal day and work done during overtime hours. A. If we are able to increase the number of gangs during the normal day in a ship, we can, instead of putting five gangs in the liberty ship, we can put up to eight gangs in a liberty ship and work them during the normal day hours rather than use the overtime or hours in excess of the normal hours.

Q. And in that manner, in addition to others which I will come to later, you seek to avoid as much overtime as you can possibly avoid? A. Yes; that is correct.

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Q. Well now, next I would like to ask a few questions about the nature of the companies doing stevedoring in the port of New York and their relation to the steamship companies. Perhaps you could tell us first in rough percentage, as between stevedoring companies who are independent in the sense that they operate under contracts with one or another of the steamship companies and the percentage of stevedoring companies in the port

but I think there are about seven or eight stevedoring companies doing work for a particular line, in other words doing work for one line. The remainder of the

who work exclusively or almost exclusively for a par-

companies in the port do work for various lines. Some have one account, others may have numerous accounts.

By the Court:

Q. What is the attachment of the stevedoring company to a particular dock; is there any? A. Usually not to a particular dock; usually they follow the steamship company. The steamship company leases certain piers, and the contracting stevedore follows the steamship company to that pier.

Q. And he uses that pier! A. He uses that pier.

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Q. He does not have to pay rent for that pier? A. No, the steamship company pays that.

Mr. Taylor: What is the nature of the contracts between stevedoring companies and steamship lines? The Witness: All contracts, with very few exceptions, are on a fixed-price basis.

Q. Meaning what! A. Meaning that the fixed price is for straight time normal work, with overtime differentials specified either in percentage or in a rate per man, or per gang.

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Q. Do I understand, then, that it is a cost-plus arrangement? A. No sir; it is a fixed price per ton or—

Q. Oh, per ton! A. Yes.

Q. I thought you meant per man. A. Well, the overtime differential when we work overtime is usually a fixed price per man, which includes the overtime differential plus insurance and social security taxes.

Q. Let us say you have a contract with the so and so company. Does it provide that you are to get so much per ton of cargo loaded or discharged, or does it provide that you are to get so much per man hour worked, or does it provide that you will set so much if done regular time

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and so much if done through other time? A. The normal commercial contract provides for so much per ton of cargo handled. Now that can be broken down into—we have had contracts as high as 80 commodities—barreled oil; boxed lard and all that sort of thing, but it is all on a price per ton of weight measured.

Q. And does the contract specify the rate shall be different if done during the day or night! A. The contract is based upon straight time work, and any overtime work is based upon the number of men employed for the overtime operation, and a rate established for the man, which includes no profit but the actual cost of insurance and

Q. In other words, let's suppose that the price on commodity A which you arranged with the steamship company is— A. \$1.50 a ton.

Q. \$1.50 a ton. Well, it turns out that you do it at night, in which case you then pay him \$1.50 a ton plus a differential, or a different rate altogether? A. No, the steamship company would pay us \$1.50 a ton plus the actual cost of working overtime for the number of menthat we would have on the job. In other words, if we had 20 men, they would pay us for the 20 men the overtime differential plus insurance and social security, or actual cost.

Q. In other words, they make up the difference in your cost between regular time and the overtime schedule! A. We could not give them a rate actually, a fair rate, an equitable rate for overtime, because of the continuing fluctuation.

The Court: I see.

By Mr. Taylor;

Q. I assume it follows that where commercial stevedoring companies may be required to bid in competition with one another for the work of a particular line, that the bids are on the basis of the tonnage rates for work during the straight time hours? A. The contracts I have ever seen, with the exception of a few made during the emergency, were all on a fixed price basis, price per ton.

Q. And do the contracts also contain a clause to the effect that the stevedore shall not work men overtime except upon first obtaining permission from the steamship

line! A. That is correct.

Q. And were similar clauses inserted in all of the War Shipping Administration contracts during the period of the war? A. Yes, in war shipping also, for army work.

Q. And in the event that overtime appears, for one reason or another, to be necesary, and the employing steamship line has authorized it, the only amount that the stevedore can add to his bill is what he actually pays out for overtime, plus the accompanying insurance charges? A. That is correct.

Q. He gets no additional profit and no overhead? A. Well, in some cases they do allow a portion of overhead, but the overtime provides for insurance and social security taxes.

Q. Are you able to make sort of a general characterization as to the size of the stevedoring companies in New York, particularly with reference to the cost of labor as one of their elements of operation? What I am trying to get at is if you can tell us how important a part, how large a part of the operating expenses of a stevedore is represented by his longshoremen payroll?

Mr. Goldwater: I would like to object to that, your Honor, as entirely immaterial and irrelevant.

The Court: Yes, but it is obvious that it must be a very predominant percentage.

Mr. Taylor: Well since it is obvious I won't press the question.

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The Court: From what he tells me, they did not pay rent for their pier space.

Mr. Taylor: That is correct.

The Court: They do not use equipment. The Witness: Oh, I did not say that.

The Court: Well, does this dock equipment belong to the stevedore or to the pier?

The Witness: The dock equipment belongs to the steamship company, but no one asked me how much equipment a contracting stevedore has.

The Court: All right, then I withdraw that part of it. You might develop that.

Q. Well, go ahead and tell us, will you? There are no mysteries here.

By the Court:

Q. I understand you used either the gear on board the ship or the gear ashore on the dock, and I did not understand that you used any of your own equipment? A. Oh, yes sir. * Where the cargo lands at the stringpiece we have to have four trucks, cranes, tractors and trailers to move it into position to the place of rest on the dock.

The Court: I see.
The Witness: Now, my own company, our gear inventory is \$300,000 besides any gear supplied by

the steamship company.
The Court: All right.

By Mr. Taylor:

Q. There are, are there not, Colonel Warwick, a number of other kinds of employees than longshoremen who, of necessity, have to perform other duties on a ship or on a pier during the time when a ship is loading or unloading? A. Oh yes, there are a number of employees on the dock that—

Q. Will you name them, please; tell what sort of men they are, what sort of work they do? A. Well, clerks on the dock that handle the clerical work in connection with the vessel's cargo. There are maintenance men on the pier who handle the upkeep of pier equipment; there are watchmen on the pier that watch the cargo; there are a number of employees that keep the pier policed, keep it clean, and a number of employees who do painting work on the ship while the ship is in port, any number of men.

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Q Yes. Now can you tell us whether those men who work along at the same time as the longshoremen, whether they have a regular day, whether they are employed on a normal day or not?

Mr. Goldwater: I object to that, your Honor, as entirely immaterial and irrelevant, and I think that particularly it is important since the classification of men indicated by the testimony as working along the same time, it becomes obvious from that classification they are not the employees of the stevedoring company.

The Court: Well, let us find out. Are they the 159 employees of the stevedoring company?

The Witness: Usually they would be employees of the steamship company.

The Court: Then that is out.

Mr. Taylor: The point of inquiry, your Honor, is merely as part of this whole picture, which I think is important to bring home to you the fact that not only has Colonel Warwick said that in his opinion the normal day is 8 to 5, but that it is also 8 to 5 for all sorts of other operations which go on at the same time on a pier or on a ship. In other

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words, on the broad basic question which is so important in this case, I want to bring in for what it is worth the fact that the waterfront operation, so to speak, very directly related to the handling of cargo, associated with it, is all on a normal 8 to 5 work day, with certain exceptions which I will point out, and which I think are more significant. The Court: All right. I am not disposed to be

The Court: All right. I am not disposed to be too strict on questions of relevance on an issue of this kind. Go ahead and bring out the fact that those employees are not the stevedore's employees, if that is the fact.

The Witness: That is correct.

Q. And what sort of a day do those men work, Colonel Warwick! A. They work the normal day of 8 to 5, and if, in the event that the ship works overtime, the long-shoremen, some of them work overtime, particularly the clerical staff who handle the papers.

Q. But there is a difference, recognized in this Collec-

tive Bargaining Agreement-

The Court: Are they embraced within the Collective Bargaining Agreement?

Mr. Taylor: Some of them are, and I am just going to call attention to it; that is, some of those which were enumerated by Colonel Warwick and which I referred to as an exception to 8 to 5 time.

Q: Now, take the case of port watchmen, for example, the Agreement with whom begins in this little volume at page 33; those men, port watchmen, have to be on the job 24 hours in the day, do they not! A. That is correct.

Q. And the agreement with respect to the men who have to work, for those reasons, 24 hours of the day, is different from the agreement as to longshoremen who have, as you say, a regular day, 8 to 5! A. That is correct.

Mr. Taylor: I call the Court's attention to page 33, paragraph 2, which reads—this is out of the port watchmen's agreement—"The basic working day"—

The Court: That is a separate agreement?.

Mr. Taylor: It is a separate agreement, but contained in this volume. They are all negotiated with the I. L. Δ. on the one hand and the New York Steamship Association on the other.

Mr. Goldwater: I don't know whether the Court assumes it, but I should state that my objection on the agreement is made to this question with respect to this contract. This is not a contract that affects the workmen who are suing here.

The Court: This present contract does not.

Mr. Goldwater: That is the contract to which the witness is now being referred.

The Court: I understand.

Mr. Goldwater: And is entirely irrelevant to the .. issue before the Court.

Mr. Taylor: Paragraph 2, on page 33, reads: "The basic work day shall consist of three shifts of eight hours each, from 8 a. m. to 4 p. m., 4 p. m. to 12 midnight, and 12 midnight to 8 a. m., except that when ships are loading or discharging men may also be employed on an 8 a. m. to 5 p. m. shift, and when working in this category through the noon meal hour shall be paid for that hour at the overtime rate."

And you find a somewhat similar provision with respect to certain men who are classified as mechanical and miscellaneous workers. The provision with respect to them is found on page 46, and reads: "Men employed on a weekly basis may be worked on a shift system, 44 hours to constitute a week's

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work, overtime to be paid for any time worked in excess of eight consecutive hours or more than eight hours in any one day."

The men that fall within that classification are men who have to work all day on the job, 24 hours in the day, for obvious reasons.

The Witness: That is correct.

Q. You are familiar, aren't you, with the fact that if you want to bring a ship into the port of New York and tie it up at a pier and discharge cargo on holidays or Sundays or after 5 o'clock in the evening, you have to get a special permit from the United States Customs authorities to bring her in in those hours! A. Well, I have heard of it, but—

Q. You are not familiar? A. I have actually had little

experience with it.

Mr. Taylor: Well I will bring that out, then, from other witnesses.

Q. You have said that so far as concerns the stevedoring companies and so far, also, as concerns the steamship companies, to whom you must go for authority to work overtime, that you both avoid working overtime as much as possible. You have stated that, haven't you? A. That is correct.

Q. Will you tell us why the steamship companies do not like to have the men work overtime? A. Well, the penalty for working overtime of 50 per cent additional, which actually means a 50 per cent increase in the cost of handling a ship, is one of the reasons. The reason the contracting stevedorés do not want to work overtime is that, despite the fact that we get paid for an overtime differential, we are still working on a rate, a straight time rate, and the loss in efficiency working overtime is con-

siderable, so that the penalty attached to working overtime is so great that both the steamship companies and contracting stevedores do not desire to have overtime work other than the regular straight time work.

Q. Will you kindly enlarge a little bit on the reasons why night work is less efficient and why it is more costly to the stevedoring companies who are getting paid only on a commodity tonnage basis? A. Well, it is partially due to the night work. The men are not able to see as well at night handling cargo as they would during the day despite the fact that the lighting is good. The general efficiency of the night operation with respect to the hauling of lighters, of moving lighters about alongside the ship, is somewhat delayed due to darkness, and the men themselves after getting past 12 o'clock midnight, one o'clock, their vitality is low. They just don't produce the same as they would during the normal working day. We are penalized-both the contractors and stevedores and steamship companies are penalized by the fact that the over-all efficiency of the ship is affected by the amount of evertime work performed by that ship.

Q. And in the case of stevedores who are getting paid on a tonnage basis and who therefore make their profit by turning out as high a tonnage per manhour as possible if you continue on into the night where the productivity of the men is such and you get no allowance for the night work except the actual disbursement, that means it is less profitable for you to work them in the night than in the daytime! A. I would say in many cases it is a difference between a profit and a loss—the number of overtime hours we put in on a ship.

Q. You said a while back that the men themselves do not like to work at night and have refused to on various occasions. Can you give us some illustrations of that and tell us why they don't like to work at night? A. Well, it has varied with the localities throughout the port. But

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the men have come openly and said through their dock steward that they didn't want to work overtime or past five o'clock. Other places men said, "To finish a ship if you need us, it is the last night, we will make the concession of working a half night to finish the ship." All during the war at the Army Base at 58th Street, Brooklyn, the men refused to work past 7 o'clock at night. In very few exceptions did we work overtime at the Army Base piers in Brooklyn on ships that were troopships, but on the general cargo ships the men refused to work past 7 o'clock at night, and it was an outright refusal. There wasn't any question about what we thought about it; the men just said, "We won't work."

By the Court:

Q. They don't show up? A. They show up. They are there during the day.

Q. But on the late shape they don't appear? A. The 7 o'clock shape—if you depend upon getting the men on the 7 o'clock shape you are running a great risk because the men are reluctant to shape at the 6.55 shaping end.

- Q. Where you do work—as you do of course work from time to time—a certain amount of overtime work and then the day gang comes in and looks at what has been turned out during the night you find a little criticism by the day gang—
 - Mr. Goldwater: I object to that. A certain amount of leading is necessary I will concede in this type of case but I don't think—

The Court: Let him finish.

Q. Well, just as an illustration can you point to any circumstances in the nature of the attitude of the day.

gangs or men who have worked during the day toward men who have worked during the night? A. Well, long-shoremen that have followed the waterfront for years know approximately how long it takes to discharge a hatch, they know how big the hatch is, they know what a day's work is. In a good many cases where we use men working overtime, bring in extra men to work overtime hours from 7 till 6 o'clock the next morning they just don't produce as much as the day gang would and the day gang will see what the night gang has done and they say, "There is no point in our killing ourselves. If they accept that from the night gang they will accept it from the day gang."

I think I covered that a short while ago when I said the over-all efficiency of the ship is affected by the men working overtime long hours.

The Court: We will take a short recess.

(Short recess.)

Mr. Taylor: Apropos a question of your Honor's as to the regular or normal working day in the regular or normal work week I would like to put into the record a further provision from the collective bargaining agreement. On page 2 of the Longshoremen's General Cargo Agreement we find this language:

"The basic working day shall consist of eight hours and the basic working week shall consist of hours."

On page 3 we find this

"Straight time rate shall be paid for any work performed between 8 a. m. and 12 noon and from 1 p. m. to 5 p. m. Monday to Friday inclusive and from 8 a. m. to 12 noon Saturday. All other time including meal hours and the legal holidays speci-

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fied herein shall be considered overtime and shall be paid for at the overtime rate."

The Court: Let me ask you this. This agreement was made in 1943, was it not?

Mr. Taylor: Yes, your Honor.

The Court: At that time the statute had already come down of 40 hours, had it not?

Mr. Taylor: Yes, sir-

The Court: Just how is that situation met by this 44-hour schedule? I don't mean how it was solved afterwards. Was there anything in the cone tract which indicated just how that was intended to be dealt with?

Mr. Taylor: I know of no provision in there to that effect.

The Court: Or was there at that time an assumption that there was no coverage?

Mr. Taylor: No, on the contrary. This provision is an ancient one. At least it was a 44-hour week for some years prior to January 1943.

The Court: Did the question come up during

the negotiations?

Mr. Taylor: Why, I think so. It came up in this way: The 44-hour week and 8-hour normal day had existed prior to F. L. S. A. When F. L. S. A. became effective of course it was also on a 44-hour week.

The Court: That is right.

Mr. Taylor: And the question arose as to whether its enactment required any change in the payment practices which had obtained under the agreement and it was considered by all members of the industry in the port and also by the I. L. A. and unquestionably by a great number of the working men that if the companies continued to pay according to the contract there would be no question that that would be a compliance.

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The Court: Even though a man would get straight time for 44 hours?

Mr. Taylor: That is what the statute called for in the beginning.

The Court: In the beginning.

Mr. Taylor: Then it was reduced from 44 to 42 hours the practice in the port on the part of the employers was to pay wage and hour overtime for two hours in the event that in the same work week the men had worked 42 straight time hours. And then it went down to 40 hours—

The Court: They did the same thing with the

4 hourst

Mr. Taylor: That is right.

The Court: What I am trying to understand is the question of the draftsmanship of this instrument.

Mr. Taylor: They didn't change.

The Court: Apparently they did not sense the conflict or what did they mean? Do you intend to introduce any evidence on that score at all?

Mr. Taylor: I shall, sir.

The Court: I am just curious.

Mr. Taylor: It is a very natural inquiry and the short answer to it is that if was—shall I say—conceded, generally recognized, accepted by employers and employees and men alike that there was a full complance without the necessity of any change in the contract if men were paid for the extra hours when they followed working 40 straight time hours in the same week and there were never any complaints about it.

The Court: There is nothing in the agreement itself drawn in 1943 which says that straight time shall apply to 40 hours and anything above 40

hours shall be paid for at time and a half.

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Mr. Taylor: No; the provision as I read it to you said—

The Court: It just says 44 hours shall be the basic work week.

Mr. Taylor: And that straight time pay shall be paid, which of course at 44 hours would be 3 hours from Monday to Friday and 4 hours on Saturday. Of course in many instances the men received very much more money under the contract than they could have hoped to have received under a strict application of the Wage and Hour rulings.

The Court: I don't want to go into that. I am confining myself solely to the draftsmanship of this instrument, to what the man did who put down those words, how he intended to solve what appears to be a conflict with the statute.

Mr. Taylor: The chronology of the thing, which you can spell out by looking at the dates when the statute became effective and when it was succussively reduced from 44 to 42 to 40 hours, will make it quite apparent that a time occurred when the 42 maximum went into effect at a time when the contract called for 44 hours.

The Court: I understand that. I am now concerned with the man who put one word next to the other when he made the 1943 agreement.

Mr. Goldwater: I am asking the same question when he drew the October 1, 1941 agreement and when he drew the January 1, 1940 agreement.

The Court: At that time we were on a 42-hour basis.

Mr. Goldwater: Exactly the same language appears right through with complete disregard of the language of the Act.

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Mr. Taylor: Well, of course, obviously. The question in his Henor's mind and what'I am trying to point out is that having arrived at the point where we were on a 44-hour basis at the point where the statute says you must pay overtime for 42 hours the company began to pay and that when the 1941 contract expired everyone being satisfied they continued with the language of the old agreement.

The Court: Your suggestion is in effect that the draftsman accepted the clause which had been operating.

Mr. Taylor: We know as a practical matter when when you try to monkey with the language in an agreement you get trouble on your hands. And we find when you go through the list there is a certain typographical pattern followed for a number of years and then you get a change in the pattern. Everybody was perfectly satisfied that everything that was being done was in accordance with the requirements of the statute.

The Court: All right.

Q. During the recess, Colonel Warwick, you have at my request, haven't you, looked at the collective bargaining agreement in order to be able to state definitely whether it does or does not contain any provision for the payment of header, gangwaymen and assistant foremen differentials? A. Yes, I have.

Q. They are not in there! A. They are not.

Q. They have been paid for a great many years as a matter of custom throughout the port? A. That is correct.

Q. And by that custom the differentials, which are specifically 5 cents, 5 cents and 15 cents, are added into a

man's pay according to the number of hours that he works in that capacity regardless of whether the hours that he works in that capacity are during the straight time or the overtime hours of the day! A. That is correct.

Q. Now we all know that a certain amount of work is done outside the normal working day. Will you be good enough to tell us why that occurs! A. Well when the ship arrives we have some idea approximately of the number of hours that it will require for the discharging of the ship. We break that down into individual hatches. We know what the engagement list contains showing the cargo to be loaded into the ship and we can approximate the number of over-all hours that will be consumed in loading and discharging the vessel. We therefore start off and work the ship to a date which is established by the steamship company as a sating date or for one reason or another we are told that the ship will work and sail at a certain time. We then start to divide the hours up to determine how many hours other than the normal working hours we will need to discharge and load the ship.

Q. And you hold that down as low as possible by using auxiliary equipment and any other means that are open to you? A. As a matter of fact in some contracts it specifies that the contractor will use two gangs in a hatch and it even goes so far as to say specifically that he will supply the additional rope falls that lead to the auxiliary equipment on the dock. In other words, to put as many gangs on the vessel during the normal working hours as he can possibly put on the ship.

Q. Is there any difference with respect to overtime as between passenger ships and cargo vessels, freighters and so on! A. Yes, there is a considerable difference.

Q. Would you tell us about it, please? A. Well, the passenger ships are usually set up on schedules published many months in advance. The ships sail at certain times, passengers are ordered down to the versel for a specific

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time. The passengers would probably come from all corners of the States and outside of the States in some cases and the ship has to be finished to sail at the time specified. It therefore requires that hours other than the normal working hours be used to finish the ship and make it certain that she sails at the date specified. The cargo ship, unless there is a definite commitment to sail a ship at a specific time, two or three hours or six hours or possibly 12 hours, the ship can fall back that many hours and utilize the normal working hours to finish rather than to—to finish at a specific time.

Q. But whether it is one kind of ship or another you don't work any overtime unless you have to for one rea-

son or another? A. That is correct.

Q. I suppose it must be obvious to all of us that conditions in t's port during the wartime were somewhat different from those during peacetime with respect to the volume of work done outside the normal day! A. That is correct.

Q. Can you tell us a little about that and the reasons; why, and how extensive the difference is? A. Well, the ships during the war were loaded to capacity. In addition to the below-deck cargo that the normal ship takes there were terrific deck cargoes of vehicles, tanks and all' sorts of military equipment carried on deck. The ships were scheduled into convoys, which meant that a certain number of vessels were planned for a specific convoy and the ships had to be worked overtime to meet the convoy date. There was no such thing as delay of two or three hours. Each ship had its specific time to leave the pier and had to leave at that time with the cargo secure. During normal times when the ships were not carrying the cargo, the volume of cargo that they carried during the war, many ships worked without any overtime at all. In other words, the ship with the amount of cargo she

handled could be completed during the normal working hours without the use of any hours other than the normal working hours. So that a commercial operation was an entirely different operation from what we had during the war.

Q. But it was still nevertheless true that if you did have to work outside the normal working hours you had to get permission from the Government to do so? A. The Government specified in their contracts that permission had to be obtained from an authority to work other than the normal working hours.

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Q. And everything that you have said previously today with respect to the disinclination of the stevedoring companies to work outside the normal hours applies equally during the wartime period? Your contracts were still on a tonnage basis? A. The Army and Navy contracts were on a fixed price tonnage basis. The War Shipping Administration had a cost-plus a fixed fee.

Q. Your company, T. Hogan & Sons, Inc., has paid the men, has it not, who worked for them as longshoremen in accordance with the terms of the collective bargaining.

agreement? A. Yes, we have.

Q. And since the hours under the Fair Labor Standards Act were reduced from 44 first to 42 and then to 40 they have paid the men for the hours in excess of the statutory limit at the contract overtime rates when and only when men had worked the maximum permitted number of hours at straight time during the same work week? A. That is right.

Q. Has your company ever had any complaints of that procedure from the union or from any members of the union? A. Not to my knowledge.

Q. Until the suits were brought? A. That is right.

Q. And you yourselves believed and understood that in proceeding in that way you were complying with the requirements of the statute? A. We did.

Q. Now then, is it true that in view of the pendency of this suit and the question now being raised as to whether those payment practices were proper and in compliance with the Act a clause has been written into the current collective bargaining agreement to the effect that if those practices are held to be unlawful by either court decision or by administrative ruling that the contract will be reopened or may be reopened for the purpose of renegotiating the wage scale?

Mr. Goldwater: Just a moment, please.

The Court: In what agreement are you referring to?

Mr. Taylor: The one that is now in effect,

The Court: That is not the one that-Mr. Taylor: No, sir, that expired on September 30, 1945. The clause which I am inquiring about is something which has been put into the current

agreement.

Mr. Goldwater: If your Honor please, your Honor has now been told the fact.

The Court: That is right.

Mr. Goldwater: I object because I don't want your Honor to consider this fact. I think it is entirely immaterial and irrelevant because the issues before your Honor do not concern the period subsequent to the date of the subsequent to the final date in the contract which your Honor has been hearing testimony on right along.

The Court: I might be perhaps a little more explicit as to why I have not been ruling with any degree of strictness on questions of relevancy. I think under the rules now where testimony is objected to on that ground in an equity suit you may nevertheless read or state the evidence on the rec200

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ord for purposes of review, which of course, counsel would invariably take advantage of I assume. Under the circumstances I don't see very much point to disposing of such motions at this stage. Moreover I suppose if I am going to rule on it now I might as well rule on it later when the whole case shapes up so that I can judge as to what turns out to be relevant.

Mr. Goldwater: I understand your Honor's reason for the ruling. The point is that unless I make objection—

The Court: Oh, I want you to.

Mr. Goldwater: —I shall have no ground on which to raise the issue if your Honor should subsequently decide that it is relevant.

The Court: I welcome your objections because it signals me that here is a question on which there is a question of relevancy. Go ahead. I will allow the answer.

Q. Do you remember the question? A. Yes, I do. It is in this latest contract.

Q. Do you know whether or not that clause was inserted at the joint request of both the union and the employers? A. I would not say with any degree of certainty that it was on the part of the union.

The Court: Presumably it went in with the consent of both or it would not be there.

Mr. Taylor: I can't really let that pass for reasons of accuracy, your Honor. The present contract is based upon an award.

The Court: I see.

Mr. Taylors And that is in the nature of a qualification on your observation.

The Court: I see. I am glad to have it brought to my attention.

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Mr. Taylor: I think it is quite true that it was in the award and then thereafter not into the contract at the request of both parties

Mr. Goldwater: It did not have to be at the request of both parties after the award said it should be in the contract. There was no point in the request after that.

Mr. Taylor: No; request, we will say, of the arbitrator.

Mr. Goldwater: Direction of the arbitrator.

Mr. Taylor: Your witness.

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Cross Examination by Mr. Goldwater:

Q. Mr. Warwick, I have made a note that one of your answers to a question of Mr. Taylor's was to the effect that there is no regularity of employment such as in the case of a factory-worker. A. That is correct.

Q. That is correct? A. Yes, sir.

Q. Well now, is there regularity of employment for a longshoreman that you could compare with any other kind of regularity of work? I mean the work of any other commonly recognized employment. A. I don't recall of any offhand.

Q. Then would I be correct in saying that the time of work of men who were employed as longshoremen is entirely unique, different from anything else that you know of! A. Why, anything else that I know of with the exception of the related work such as shenango work, working along the pier.

Q. What is shenango work?

Mr. Taylor: Wait a minute. Excuse me, Mr. Goldwater. Please let him finish his answer.

Mr. Goldwater: I thought that he had. He said shenango work and I asked him what is shenango work.

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Mr. Taylor: If he has finished, all right, and if he hasn't-

The Court: Have you completed your answer!

The Witness: Well, it is a casual-

The Court: What Mr. Taylor means is, are there any other comparisons that you wanted to make in addition to shenango work?

The Witness: I can't recall any offhand.

Q. Now will you describe what you mean by shenango work! A. Where men discharge lighters for a lighterage company where the lighter foreman comes out to the pierhead and takes the men in at intervals and hires them to discharge lighters onto the pier. Outside of that—

Q. It is the kind of work, as I understand you, which is performed at the same time and under approximately the same general conditions as the work done by men who work as longshoremen? A. Not actually at the same time. Shenango work could be carried on when there are no longshoremen on the ship at all. They discharge lighters. It is entirely apart from the loading of the ship.

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Q. You mean lighters as distinguished from the ships on which the longshoremen work! A. That is true.

Q. And are the men that do that work covered by any union contract that you know of? A. I don't think so.

Q. You don't know of any! A. I don't know of any.

Q. All right. Now you have described generally this business of the shape. Your testimony was that the shape—and you corrected it subsequently—A. The time of the shape.

Q. —was 6.55 and 12.55? A. Yes.

Q. You corrected it to 7.55 and 12.55? A. That is right.

Q. You didn't mean that those were the only hours of shape under the contract effective October 1, 1943, did

you! A. There were three hours. I mentioned three hours of shape.

Q. Did you! Subsequently! A. Yes.

Q. You first didn't? A. Yes, I mentioned three hours, the regular shaping hours,

Q. And they were

The Court: 7.55, 12.55 and 6.55 p. m. The Witness: That is correct.

Q. And I am not sure whether you cleared up this business of the brass check. Do I understand that the man retained the brass check until the completion of the work week? A. Yes, that is correct.

Q. And that would be to whether he worked one hour, 40 hours or 44 hours or 66 hours in the week? A. Yes. You said one hour but he couldn't very well work one hour.

Q. I didn't mean literally one hour; I meant a considerable number of hours or a substantial— A: That is correct, he held us for the pay week.

Q. Now he got that check when he passed through the gate you said? A. Yes, that is right. In some cases they issue them when the men get down the dock, but the general practice is when they go through.

Q. It was upon the occasion of his first employment in that work week? A. That is correct.

Q. You said that the men are assembled into gangs very frequently? A. Well, L meant they are always assembled in the gangs.

Q. Oh, they are always assembled in the gangs? A. Let me just clear you on that a little. When the men are hired they are hired as so many deck men, so many hold men and so many gang men. They have to be assembled into gangs because you need so many deck men, so many hold men and so many gang men to discharge one cargo for the complete operation.

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Q. How many men are there in total in a gang? A. 20 men excluding drivers of mobile equipment.

Q. They are not considered in the gang of longshoremen? A. No. There are 20 men in a regular gang.

Q. The drivers of mobile equipment haven't anything to do with the longshoremen's contract that you have been talking about here? A. No, that is correct.

Q. Now you said there are various identification methods for the men by company number and otherwise. A. That

is correct.

215 Q. And that those methods might vary with the companies? A. That is correct.

Q. But there is one identification method that is uniform, is there not, and that is the Social Security record of the man! A. That is correct.

Q. And so by reference to the man's Social Security record which you must or the company must accurately keep you can always determine how many hours the man worked in any work week? A. Yes, that is true.

Q. And what the hours were in the work week that he worked? A. You mean to differentiate between straight

time hours and overtime hours?

Q. Yes. You must necessarily differentiate when he was paid a different rate for different hours, isn't that so?

AAThat is right

Q. And your Social Security records would indicate that

accurately? A. Yes.

Q. Your pay day was Friday for the previous week's work? A. That is right.

Q. And you say the work began on Monday and continued till the following Monday? A. That is true.

Q. You would then include Saturday and Sunday in a normal work week? A. Not in a normal work week, no.

Q. You would not? A. You would include seven days, but the normal work week would be five days and four hours on Saturday.

Q. Why did you say then that the work week continued from Monday till the following Monday? Those were your words. A. The records continue but the normal work week does not change with the record.

The Court: In other words, if a man did work on Saturday that would be applied to the preceding week and not to the succeeding one?

The Witness: That is right.

- Q. And I suppose it follows then that what he was paid on Friday the Saturday or Sunday work was included as part of the pay of the preceding week? A. Well, it would be included in the total of the preceding week.
- Q. Yes. Did he get a pay envelope with a record of the time worked by him? A. Yes. I say yes. We paid them that way; I am not quite sure—

Q. Well, we talk of your company now. A. Yes.

Q. Did you show specifically the hours worked in the day and the hours worked at night on the record you handed the man with his envelope? A. We show the daytime hours and the overtime hours, yes.

Q. And did you show which of those were on which 219 days? A. No, I don't think so. I think we totalled the

hours.

Q. Just the total number at straight time pay and the total number at overtime pay? A. We may break it down. I am not sure of that. But we do segregate the straight time hours from the overtime hours.

Q. Would you show straight hours at so much pay and

what you call overtime hours? A. That is true.

Q. And those overtime hours I assume follow the contract provision? A. Yes.

Q. In other words, every hour worked by the man after five o'clock at pight whether it covered the meal hour be-

tween 6 and 7 or the hour between 5 and 6 or period after 7 at night was considered overtime hours? A. Yes. Well, the meal hour is a penalty hour.

Q. I beg your pardon? A. The meal hour is a penalty

hour. You referred to that hour as overtime.

Q. Well, he was paid at what was called the overtime rate in the contract? A. That is correct.

Q. You did not distinguish on your statement to the man whether it was meal hour or any other hour? A. That is correct.

Q. It was merely an hour at overtime rate? A. That is right.

Q. And in the description of the pay, so many overtime hours, there was no differentiation as to whether a man started at the night shape-up, 6.55, or whether he had started at the morning shape-up at 7.55, or whether he had started at the noon shape-up at 12.55? A. No, it shows the total hours. There is no other record on there to indicate what other hours he worked.

Q. In other words, the hours of overtime for which, you paid when you gave him his envelope and the statement were the same and the statement was the same, whether the overtime hours paid for were two hours after day work or whether they were all hours worked after 6.55 shape-up at night?

Q. (Read.)

Q. Do you understand the question? A. I think I understand it. In other words, the envelope just indicates the total number of overtime hours and the total number of straight time hours. It would not indicate anything other than that.

Q. Well now, you have described for Mr. Taylor what is meant by a header and by a gangwayman, do I understand that the header and the gangwayman both worked along with the men? A. Oh yes.

Q. They did exactly the same kind of work as the men

in the gang who they headed? A. They did the same work and they directed a small group.

Q. But they did the same amount of physical work as those men, or were expected to do the same kind of physical work? A. Yes.

Q. In other words, they were not paid for supervision alone? A. They were paid a differential for the supervision.

Q. Yes, but not for supervision alone? That is not what they got, either \$1.25 plus the differential or \$1.871/2

plus the differential ! A. No.

Q. Now, Mr. Taylor read into the record the provisions of paragraph 8A of the agreement effective October 1. 1943; which appear on page 6, and asked you questions concerning it. That is the paragraph that describes shaping time at 7.55 a. m., 12.55 p. m. and 6.55 p. m. The second sentence is, "Men may be ordered out, however, for any other hour." That is followed by, "provided that those wanted between the hours of 8.00 a. m. and 12 noon shall receive notice at 7.55 a. m. shape," and so forth. Now, let me ask you whether a man who worked what you have described as the normal day period of work from 8 a. m. to 5 p. m., would normally be told at the midday shape that he was needed for an extra hour or two after 5 p. m. ! A. No, he would not. The general practice is he would not.

Q. He would just be carried over for an extra hour or two, that is, towards the end of the day? A. That is right.

Q. The foreman would say, "Everybody stay an extra hour or two or finish 6.30"? A. It would depend on the conditions at, say, 4.30, as to whether or not they continued past 5 o'clock.

Q. Suppose a man worked during the day, working during the day was wanted at 7 p. m. or later, when would he be told? A. If he worked until 5 o'clock he

would be told at 7 o'clock. He would be told to shape up 7 o'clock.

The Court: He would be told to shape?

The Witness: Oh, yes, sir, we have a right to shape at 7 o'clock. The conditions that might exist between 5 and 7 might be such that for any number of reasons we could not start up, although we planned to start at 7 we could not start. So the man is told to shape at 7 o'clock. We have a right to shape the men at the 7 o'clock shape.

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Q. Are you distinguishing now between telling the man definitely to work at 7 or telling the man only to shape at 7? At 5 o'clock we would tell him to shape at 7, but at 6 o'clock if he went to supper at 6 o'clock we would say to be back at 7 or shape at 7 o'clock. In other words, if the man worked until 6 o'clock or 5 o'clock we delayed telling the men as long as we possibly could due to the conditions that existed, as to whether or not we could use them at 7 o'clock.

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Q. Do you distinguish between telling him when he goes out to eat under those circumstances at 6 o'clock as you describe, do you distinguish between telling him to work at 7 or shape at 7? A. Yes, there is a very definite distinction. The distinction is if you say or order the man back at 7 o'clock you are giving him a definite order to come back and work at 7 o'clock. If you say shape at 7 o'clock, you tell the man to shape at 7 o'clock, at the 7 o'clock shape, and then you decide between the hours of 5 and 7 or 6 and 7 whether or not you want to use the men at 7 o'clock.

Q. Why wouldn't you know at 6 when the men were going out, why wouldn't you know then that you did or not not need them at 7 o'clock? A. For a number of reasons. It might come on to rain. The cargo, we would be given instructions that the cargo would arrive at 6

o'clock, between 6 and 7. We would make our plans based upon that. The cargo for some reason or other didn't arrive. The power of the ship might go off between 6 and 7 for some reason or other. There are any number of things that could happen which would stop us between the hour of 6 or 7 from being in a position to actually put the men to work at 7 o'clock.

Q. Would you say that all those things, Mr. Warwick, were reasons which affected the regularity of the men's employment? A. I think all of those reasons do affect

the regularity.

Q. You have described the formation of the men into gangs and you have said that because of the conditions you described men worked at night where it was necessary to finish a job, is that right? A. To finish a job or to handle the work at hand, or some reason or other.

Q. Did they ever start to work at night or work at night to start a job? A. Oh yes, that is quite possible.

Q. So that what you have been talking about as overtime is to be understood as restricted to hours worked by the men after they had worked, or only worked by the men after they had worked just straight 8 hours during the day? A. I do not quite understand the question.

Q. Mr. Taylor has asked you a number of questions and has asked about the term overtime, and you have answered his questions and in doing so used the term. Now, when you used that term do I understand that you were applying it only to hours worked by men who had worked previously during the day! A. Oh, no, I apply it to the regular working day.

The Court: You mean the time and a half period, whatever it happens to be, as used in the I. L. A. agreement, which means non-regular day-time work, whether it is the beginning, middle or end of an operation, whether it is the commence-

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ment of the work for this particular man or the conclusion of the work for this particular man? The Witness: That is right, it may be a passenger ship that would start up for some reason or other at 7 o'clock, starting to work at 7 o'clock at night. It is quite possible. There are exceptions to the rule.

Q. Is the passenger work starting to work at 7 o'clock at night exceptional? A. I would say so, oh, yes.

Q. How many times have you known it to happen in your career? A. We have handled the larger ships, the Majestic, Olympic, Manhattan and Washington, and I would say that it was an exception when we started a ship at 7 o'clock at night.

Q. What about exclusive cargo ships? A. Cargo ships we usually start during the normal working hours between 8 and 12. As a matter of fact, a cargo ship arriving in Quarantine in the early afternoon would be held out until the following morning so we could start it at 8 o'clock in the morning.

The Court: During the summer before the war when you had a very rapid turnover of the transatlantic liners moving on fast schedules, you had to work whenever the occasion occurred?

The Witness: The fast liners take very little cargo, and although there were certain times we did work overtime we were able to confine that considerably to normal working hours.

The Court: Did they discharge mail?
The Witness: Mail, baggage, and usually express cargo.

Q. Now, Mr. Warwick, where a man started to work at 8 o'clock in the morning it did not necessarily follow that

he would work 8 hours, that is, from 8 to 5, less lunch that day, did it? A. No, he could be knocked off at 12 o'clock.

Q. He might work four hours? A. We try to keep it in four-hour groups if we can.

Q. But even that did not always happen, did it? A. That is correct.

Q. He might work only two hours? A. That is correct.

Q. Or he might work six hours? A. That is correct.

Q. Might that also not be true of men who started to work at night? A. What is the finish of your question?

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The Court: That they only worked two, four or six hours instead of the regular eight hours.

The Witness: Oh, yes, sir, they could work four hours. If we had to work overtime we tried to cut it off at 11 o'clock, if the men started to work at 7 o'clock.

Q. But there is no regularity about that practice, is there! A. There is no regularity about the whole industry.

Q. Might it not also be true, or don't you know it to be the fact, that men who worked in gangs beginning at 7 o'clock, were at the end of their night work told to report back as a gang the next night? A. The chances are it did happen, but there was no reason for it to happen, because they had a 7 o'clock shape that night which they could very well tell the men to shape for. If they did it I think it was being a little generous on the part of the employer to do it. He did not have to do it under his agreement.

Q. He did not have to do it under his agreement, but he had men who had been working for him in groups and tried to retain the same men, although as you said

there was no regularity about that either, but as a general thing a man who was satisfied with his employer would report back to him, to the same employer, and try to get a job from him, wouldn't he? A. That is quite right.

Q. That was a natural thing! A. That was a natural

thing.

Q. And it would also be natural for an employer when he had a gang that worked together well, to keep theosame gang together? A. Yes, I think that is right.

Q. You would get most efficiency that way! A. That

is right.

Q. And if you knew that you had a cargo that was going to take six or seven days that you had to unload, and you had a specified time, as you said, you try to estimate the time when the cargo was first displayed, and you knew when the sailing time was for the ship, you could tell pretty well whether you needed a night gang to work three or four or five nights in succession, couldn't you? A. No.

Q. You could not even tell that? A. You could not tell that, because you cannot tell when it is going to rain,

for example.

Q. That, of course, is a contingency nobody could count on? A. It is true of the cargo too. For instance, you may get a promise from the railroad te deliver a cargo at a certain time, but that is only a promise and it may not materialize. That was the reason why the employers wanted a 7 o'clock shape, as a matter of fact.

Q. Is that indefiniteness of delivery by railroad of a cargo another one of the things that make the irregularity in this employment? A. It is one of the contingencies we have to contend with. There is no question about that.

Q. It is a fact that you do not get performance as per promise because of a number of things? A. That is quite true.

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Q. And that conduces to an irregularity of employment, doesn't it? A. It is irregularity for periods outside of the normal day, but you can confine it pretty well because after all we have three shapes and we only have one shape at night. If we make a mistake at the night shape, why, it means the whole night, but where we have a shape at 8 o'clock in the morning and at one o'clock we can gauge our work to within an hour, just the span of the meal hour.

Q. It is not really accurate to say that if you make a mistake at night that it affects the whole night, is it? A. It affects it that you cannot get the men back; for instance, if the cargo was not delivered until after you knocked the men off at 10 o'clock, if the cargo is delivered at 12 o'clock af night we cannot get the men until the next morning at the 8 o'clock shape.

Q. But if you started the men after the night shape, that did not mean they were employed the whole night?

A. Oh, no, no.

Q. The very irregularity and indefiniteness of deliveries of the cargo, and these attempted determinations of periods for removal of cargo or placement of cargo, in order to comply as nearly as you could with the company's sailing date schedules, those were the things that induced the creation of shapes in all the contracts here. isn't that so! A. Well, that contributed to a part of it. There is no question about that.

Q. What else was there that induced the companies in their dealings with the men to have shapes three times in 24 hours? A. It gave them the opportunity to plan their work, plan the work in connection with the delivery of cargo. The delivery from the railroad is only part of the delivery of cargo. The delivery of truck cargo, for instance, at 8 o'clock in the morning, you would not know just how much truck cargo you might expect during the morning or the afternoon.

Q. That is another indefinite factor! A. There is a certain degree of definiteness about the business. There is no question about that, that we can control within the normal working hours, but there are many things that we are dependent upon to be partly executed in order to load the ship.

Q. Is one of the things that you cannot control the tides!

A, I am quite sure it is.

Q. It has some effect on this business, hasn't it?

The Court: It is one thing, however, you can forecast with a great degree of accuracy?

The Witness: That is right.

Q. But you cannot tell whether the ship is coming into port in time to catch the tide coming in or not? A. With some of the large ships they try to make the tide, high water slack, to dock.

Q. Of course, they always try but they are not always successful? A. They are not always successful, but they—

Q. And that fluctuates whether you want men at a certain shape or not, doesn't it! A. Oh yes.

Q Fog is something that you cannot control either, isn't it! A. That is quite true, but they have made progress, though, with radar.

Q. In forecasting, of course. That is not always accurate? A. The forecasting?

Q. Yes. A. I thought you meant radar. I said they had made progress with radar.

Q. I am sorry, I did not hear the end of your answer. You mean with radar? A. Yes,

Q. That is a rather recent development? A. During the war it was very successful.

Q. But it is recent with respect to the history of this industry, isn't it? A. That is right.

Q. Would you say that the number of hours worked by employees weekly varied greatly? A. Well, I think you could break it down into groups.

Q. Suppose you do it, Mr. Warwick, and answer it any way you think is proper. A. It does vary very greatly, but there are a certain number that would average more than others. There is a nucleus that probably would average more than others, but there is probably a great deal-of irregularity.

Q. When you talk about a certain number that would average more than others, you mean those who are the old standbys with the company and would get the first selection of work when it was available? A. No, I mean the ambitious fellow would probably do all right. Those who are satisfied to work two days a week will enly get two days a week.

Q. You do not mean by that, do you, that the number of hours worked depends solely upon the wishes or the will of the men, do you! A. No, it depends entirely upon the business and the availability of work.

The Court: During the war you had a shortage of men and anybody that wanted to work could always get a job?

The Witness: That is true, and that was due to the number of men who handled explosives. Quite a number were taken out of the longshore business, and the Army took quite a few.

Q. You are quite clear, are you, that not only did the companies object to the men working at night but the men themselves always object to it? A. I would not say that. You say "always."

Q. I am sorry, I did not mean to put the word "always" into your mouth, but the men generally object to it! A. I would say that the men I have had contact.

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with, those that did not want to work at night were as

many as those who wanted to work ..

Q. I got quite a different impression from your answer now, and I am sure anyone in the courtroom would. Perhaps we misunderstood you in your answers to Mr. Taylor's questions. I got the impression before that you were trying to convey the idea that in general the men objected to night work as much as the companies. A. Yes, I think is true.

Q. Is that so or is it just as many men are willing to work nights as days? A. No, I think that is absolutely

true.

Q. Which is it? A. The statement I just made in answer to your question is true, that the men generally object to night work.

Q. Do you know whether from your contact with the industry and your knowledge of the history of the industry, which goes back pretty far, do you know whether that has always been generally true? A. Yes, sir.

Mr. Taylor: You bring in that word "always."
It is a pretty big word.

Q. Has the generality of your statement been true as 252 far back as you can remember? A. Yes, I think it has

Q. I would like to refer you to the subject of the regular work week being 44 hours. Do you know how far back you would say the regular work week was 44 hours! A. As I recall I think it was around 1920.

Q. You were in the business at that time, were you!

A. I came in in 1921, but I did work during the summer months back as far as 1918.

Q. I would call your attention to the fact that one of the exhibits would indicate that during the period October 1, 1921 to September 20, 1922, the week was described as a 48-hour week. A. That is quite possible. I know it was back quite 2 ways.

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Q. And from 1922 to 1923 again it was a 48-hour week? A. That is quite possible.

Q. From 1923 to 1924 again a 48-hour week. Is your recollection refreshed at all? A. No, that is quite a long

ways back. I would not be a bit surprised.

Q. The same was true for the period 1924-25, 1925-26, and it first became a 44-hour week in the period for October 1, 1926! A. That is quite possible. I said it was a long time ago. It is 20 years ago, after all.

Mr. Taylor: You say 1926?

Mr. Goldwater: Yes, October 1, 1926, to Sep- 254 tember 1, 1927.

Mr. Taylor: That is pretty close to 20 years.

Q. Did you say you did some work in the industry in 1918? A. I said I worked in the office during my summer vacations.

Q. Did you have anything to do with time sheets during that time? A. We saw the time sheets come into the office, but it was entirely different.

You do not recall that the period of October 1, 1918 to September 30, 1919, it was a 40-hour week? A. No, I am sorry.

Q. You do not remember? A. No.

The Court: That is the close of the war period.

Mr. Goldwater: . It was after the war,

The Court: The contract was dated around October 1918.

Mr. Goldwater: October 1, 1918.

The Court: So it was negotiated before the war was over?

Mr. Goldwater: That is not always so.

The Court: It might have been retroactive?

Mr. Goldwater: They very, very frequently are in my experience.

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The Court: Well, I guess you are right.

Q. On the difference between what is called straight time and overtime in this contract, Mr. Warwick, has it always been that overtime represented exactly one and a half times straight time?

Mr. Taylor: Are not the agreements the best evidence of that?

The Court: He might test his memory and credibility.

Mr. Taylor: For that purpose I do not object.

A. My memory is not too good. I always refer to the agreements. I would not want to guess at it.

.Q. Do you also know whether the night work time, the rate paid for that time, was always called overtime?

Mr. Taylor: I think the same objection goes.

The Court: The same disposition. He may answer. Do you know?

The Witness: No, sir, I do not. I would not want to speculate on it.

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Q. You have said, Mr. Warwick, that the contracts which were made with the shipping companies made provision for the overtime differential? A. Yes.

Q. You have said that while the contracts called for a definite price per ton you could not give a fair rate with overtime work included? A. That is correct.

Q. And you have said that that was because of the fluctuation or variation in overtime work? A. That is correct.

Q. And by that overtime work I now understand you to mean because there might be night work as well as an hour or two or three of what might be called straight

overtime, overtime coming after straight hours employed during the day? A. I did not quite get your question, I am sorry.

Q. (Read.)

Mr. Taylor: May I plead as being a person who has not enough intelligence to understand that question.

The Court: That would not be of importance It is the witness. Does the witness understand it. The Witness: I think you are trying to draw

a differential-

The Court: Do you understand the question?

Q. No, I am not trying to differentiate. I am trying to ask you whether you try to differentiate. A. I am sorry, I cannot answer the question.

Q. Let me try to do it again so that even Mr. Taylor will understand it. Do I understand you now to say that the fluctuation or variation which made it impossible for you to give a fair rate on a Job on a straight tonnage basis, was a fluctuation or variation which included work nights only as well as overtime following day work? I am awfully sorry, but I do not quite understand.

The Court: You do not draw any distinction between night work per se and night work which follows day work?

The Witness: No, sir, we do not. It is in excess of the normal working day.

The Court: In excess or is it at another time then?

The Witness: It would be another time if it was in excess of the normal working day.

Q. But it might be at another time when it was not in excess of the man's day work?

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Mr. Taylor: What he means by excess is outside obviously.

The Court: That is what you mean?

The Witness: Yes, sir.

The Court: It is the fact that the work and the time of the clock differ from 8 to 51

The Witness: Yes, sir.

The Court: That is what determines?

The Witness: Yes.

The Court: It does not make any difference whether he worked before he started his night work or whether he was asleep before he started his night work?

The Witness: That is right.

Q. You said that the contracts with the shipping companies provide that there shall be no overtime work without first obtaining permission of the shipping companies?

A. That is correct. I think I said contracts that I saw.

Q. Well, of course, we are referring only to those that you know about. I would like to so you with respect to that how you got your authorization, what time of the day you got your authorization, for night work. A. It varied. It usually came, if we were to continue after five o'clock, we usually got our authorization about four o'clock, between 4 and 4:30, if we were to continue on with the overtime work.

Q. Did you determine then at that time whether you were going to keep the men who were working days for two or three hours, or whether you were going to start a new gang at the shape at 6.55? A. It went back a little farther than that. It depended on whether or not the men were shaped at 7 o'clock that night. If we had men told to shape at the 7 o'clock shape, and we thought that they mucht be employed for longer than half a night,

we in some cases put on additional men or new men at the 7 o'clock shape, but if we worked through as we did many times, the men referred to work through until 7 o'clock, and then go home rather than come back at the night shape, which we did many times.

Q. Did you ever work through to 7 o'clock and then start the men again at 8 o'clock, the same men, and work through the night? A. We might have once or twice, but it was a very rare exception.

Q. You are speaking now of your own company? A. That is correct.

Q. You do not know whether that was done by the Huron Company? A. No.

Q. Do you know whether or not it was done by the Bay Ridge Company? A. No, I would not know that either.

Q. Your attention has been called to the contract of the port watchman which you find in the exhibit which Mr. Taylor handed you? A. Yes.

Q. You have it before you? A. Yes.

Q. Your attention was specifically called to the provisions of 2 and 3, which appear on pages 33 and 34. 2 provides that the basic working day shall consist of three shifts of 8 hours each. There is no equivalent provision in the longshoremen's agreement, is there? A. No, there is not.

Q. 3-A provides for a fixed dollar rate for an 8-hour day for watchmen and for gatemen and for roundsmen, does it not? A. That is what it says here.

Q. Is there a fixed daily rate for men in the longshore work? A: There is a first straight time rate, yes.

The Court: Hourly rate?

Q. It is not a daily rate, is it? A. No, it is an hourly rate.

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Q. Is there a provision in the port watchmen's agreement for knocking off? A. I do not know really. We do not handle watchmen.

Q. Do you know of your own knowledge whether there is any provision or whether there has ever been a practice of shape-up three times a day for port watchmen? A. I would not know that. We do not employ watchmen.

Q. In the general cargo agreements there is a provision that men shall work any night of the week, is there not?

A. Yes, there is.

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Mr. Taylor: Why don't you direct his attention to it and the Court's also.

Mr. Goldwater: It is in paragraph 2-A on page 2. I am sure the witness knew that without having his attention directed to the paragraph.

Mr. Taylor: I was not sure that you did.

Mr. Goldwater: You were not sure I did! I was reading from it. It was in my hand.

The Court: All right.

Q. Do you know why that provision was inserted in the contract? A. I think I know, yes.

Q. Suppose you tell me why you think that there was such a provision there? A. I think it was put in there so that in the event of a situation arising where we needed to work times other than the straight, normal working day, we could under certain conditions obtain the men to do the work.

Q. You talked of the differentials that are added into a man's pay, is there time and a half included on the differential in fixing the so-called overtime rate in the contract? A. On general cargo, you mean?

Q. Yes. A. Yes.

Q. Time and a half on the differential? A. Time and a half on the differential?

Q. Yes. A. No.

Q. There is not? A. There is not.

Q. You have indicated a distinction between work on passenger ships and cargo ships with respect to the work of the longshoremen. A. You mean with respect to the time, sailing time?

Q. Yes. A. Yes, there is.

Q. There is a distinction in your opinion? A. Yes.

Q. Generally all passenger ships also carry cargo! A. I would say with very few exceptions most of the ships could be classified as combination passenger and cargo ships.

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Is there in cases of passenger ships greater pressure because of sailing time announced to passengers to terminate loading or unloading than there is with respect to straight cargo ships? A. Oh yes, to finish them at a definite time, oh yes.

Q. Is there then greater occasion or does it happen on more frequent occasions that there is night work on passenger ships in loading or unloading than there is on cargo ships? A. That is quite involved, depending upon the type of cargo and the number of days the ship is in port. We work to a definite date on a passenger ship where a cargo ship we can, if necessary, fall back six or eight hours.

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Q. You have said, however, that a variation of two or three or six or twelve hours under normal conditions on a cargo vessel was not important. A. It is important, but we try to—

Q. Suppose you tell us how it is important. A. We try to avoid it. If we set a date up and a time for a ship, regardless of what type of ship it is we like to complete the job and sail her at that time; but in the event of a cargo ship falling back for some reason or other two to four hours, it is not as serious as it would be for

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a passenger ship that is scheduled to sail at a definite time.

Q. To whom is it important whether the cargo ship sails on time or not? A. I think it is important to the steamship company to sail it.

Q. Why? A. They have certain cargo commitments—oh, various reasons why they want to sail her at a time.

The Court: Its business is to carry cargo?
The Witness: It is in competition with other companies.

The Court: He is not carrying cargo while he is sitting waiting for a crew of longshoremen to come back to work.

Q. And that is what induces them to give night work to longshoremen to get the ship filled as soon as possible with its cargo and get it off! A: It is not quite as easy as that. It is not quite that way.

(Recess until 2:15 p. m.)

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AFTERNOON SESSION.

ANDREW D. WARWICK, resumed the stand. .

Mr. Goldwater: In inquiring of this witness if he knew of the work weeks in a period prior to 1926, your Honor will recall that I asked if he knew if the work week was 40 hours in the period from 1918 to 1919. Mr. O'Grady, my associate, has re-examined the contract. Apparently there is a conflict and confusion between the first and second paragraphs. I think it may well be con-

sidered that that work week was 44 hours. The other work weeks I referred to were in fact 48. The contract, if anyone looks at it, you will see is very confusing. It may well be considered as 40 or as 44. I would think that the better construction on a re-examination was 40 at that time, and not 44, as I indicated in my question.

Mr. Taylor: I was going to call your Honor's attention to that matter, because the contract reads, "The basic working day is eight hours and

Saturday half-holidays."

Mr. Goldwater: If you will look at the next paragraph, that is where the confusion arises, where the words "exclusive of Saturday" come in. You do not know how to treat the "exclusive of Saturdays", whether they are talking of forenoon Saturday or all day Saturday. However, we will agree that the better construction would be 44 hours and not 40.

I have no further questions at this time.

(Witness excused.)

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PHILIP L. B. IGLEHART, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

- Q. Where do you live, Mr. Iglehart? A. Westbury, Long Island.
- Q. What is your business? A. Vice-president and a director of Huron Stevedoring Corporation, and also the same of the parent company, Grace Line, Inc.
- Q. How long have you been connected either with Huron or Grace Line? A. I started with Grace Line in

1931, and I think I became an officer of Huron in 1940 or 1941.

Q. Tell us a little bit about your experience on ships, on piers and stevedering operations, and so on, so that we will know a little bit more about your background? A. I started working as a cadet on board ship in 1931, and went through the various departments of the steamship company, including accounting and claims, and about five years in traffic, somewhat interlacing with the operating end; and my first task with operations was in 1939 as superintendent of one of our piers; and then in 1941 I became vice-president of operations of Grace

Line.

Q. What have you been doing during the war! A. I remained in that job until 1943, where I spent about half of my time with the War Shipping Administration here in New York; and then, when the present War Shipping Administrator, Captain Conway, was called to Washington in March, 1943, as deputy administrator, I went down as his assistant. I was there about two years.

Q. Will you tell us a little bit about the Grace Line, the nature of its operations and about Huron, and so forth, so that we will get a picture of that. A. The Huron Stevedoring Corporation, for all intents and purposes it is the stevedoring company of, or does the stevedoring for the Grace Line only. That in explanation of the fact that we are not quite in the same category as what is known as a contract stevedore. We do not do stevedoring for any other steamship companies. At present the operation is at Piers 57 and 58 on the North River.

Q Now about the Grace Line. A. Do I understand not during the war? Because the war period was something where we acted for the government as agents. We were not operating our own vessels, and the entire

Philip L. B. Iglehart-For Defendants-Direct.

method of operating steamships was somewhat different than it is in normal times.

Q. I meant particularly in normal times. A. In normal times we operated a service from New York and other Atlantic ports to the west coast of South America, which was fundamentally a weekly service, with combination passenger and freight vessels. In addition to that, from 1937-prior to 1937-we operated the service with passenger vessels, the same freight and passenger vessels, between New York and California. Since 1937 we have operated with the same ships that were in the 284 California run a weekly service in the Caribbean, primarily to Venezuela and Colombia. In addition to that we operate a freighter service from Gulf ports to the west coast of South America, and from Pacific and North Pacific ports to Central and South America.

Q. In connection with this matter of longshoremen's work and stevedoring which we are concerned with here in this case, is there a difference in actual practice between passenger vessels and cargo vessels? A. Yes, there is a very considerable difference, and that, again should be broken down into categories of different types. For instance, the big Transatlantic carriers which are 285 probably primarily passengers, carry a very small percentage of freight. The category of passenger vessel that we operate, the port time that is required, say in New York, is basically that time required to handle freight. We cannot turn the ships around just for passengers. They have to stay here a sufficient time to load and-discharge cargo. There are really two more categories. The other, the third, is a straight cargo vessel, which does not have the requirements of a passenger liner, which is on a given schedule with very definite commitments. The delay of a cargo vessel is

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not half as important. The fourth category is the tramp, which I simply mention because there is a fairly big business in tramping.

Q. And you have boats, as you have told us, in those different categories, except perhaps the first one that you mentioned? A. The first and fourth we do not

really.

Q. Would you care to generalize a little bit more, Mr. Iglehart, as to the relationship between the type of vessel as to schedules and time of cargo loading and unloading, and so forth, and how it may work out in whether a vessel's operation involves more or less overtime while in the port of New York. A. In the case of a cargo vessel, in the first place the construction of the vessel is such that it is built for handling freight. The hatches for working cargo are large. Every provision is made to be able to handle cargo of any particular type as expeditiously as possible, whereas on a passenger vessel you have to give way somewhat to take care of passenger accommodations. You may have to, what is known as "trunking" the hatches, where you take the tweendecks of a ship and put passenger accommodations in them, permanently built in them, which means instead of being able to handle cargo at the decks you have to go through perhaps two decks into the lower hold to get at it. The difficulty of handling a passenger ship through side ports, or other instances I have given, makes them a more difficult freight operation. At the same time a passenger vessel generally, because of its speed and the type of cargo it carries, the fast boat or a boat on a definite itinerary, generally can secure a higher class of better-paying freight than an ordinary freighter, and it would require a good deal more time to handle, say, a like amount of tonnage on a passenger ship for those reasons than it would on a freighter.

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Q. Well it is your own experience that the different kinds of vessels which you operate show any usual or common difference between different kinds of vessels and the amount of overtime that you put in on then in the port of New York? A. Yes, we work a great deal more overtime on passenger vessels than we do on freight. Particularly on one of our routes we have a contract with the United States Government where we have to name specific vessels, their itinerary, their arrival and departure dates. In one case they covered 27 or 28 ports and arrived at a given date and departed at a given date. We have other dates for cargo that require arrival and departures-

Q The significance of that is that where you have a schedule to meet you may run into conditions of one sort' or another which make the use of overtime longshore work necessary, that would not be true in the case of cargo vessels or the other types which have greater free-

dom of schedule? A. That is true.

Q. However that may be, have you any hesitation in saying that you never work any overtime if you can pos-

sibly avoid it? A. No, that is perfectly correct.

Q. Is there any doubt that this 50 per cent overriding that is provided for in this port is a real deterrent? A .-It certainly is. In particular, I don't think its purposeit is not the most important point, but certainly any line under the American flag with stiff competition in offshore routes has got to keep its costs down just as far as possible if they are going to be able to continue to operate against competition in foreign markets.

Q. Is that one reason why you tried to increase your efficiency and work as much during the daytime hours as is possible? A. That is correct. For example, on the ships we operated before the war we used to be able to work as high as 11 and 12 gangs, whereas an ordinary

freighter can work five or six, and we did work that in normal working hours. We worked the maximum gangs that we could work in normal daylight regular hours, and at night we put on what gangs were required to carry out our work.

The Court: You are aware of the fact that the present controversy relates to a period or was completely during the war?

Mr. Taylor: Is that a question to me, sir?

The Court: Yes.

Mr. Taylor: To be sure, but, after all-

The Court: Are you going to get to the differences between this historical period and the period in issue.

Mr. Taylor: Of course, the historical period is the one in which Congress came forth with these words which your Honor is going to construe.

The Court: I am aware of that.

Q. Won't you tell the Court, then, Mr. Iglehart, something about the differences, such as they were, between peace time and war time practices! A. Well, in our particular case we were one of the few lines that operated exclusively in the Western hemisphere, and we were classed as a commercial necessity. We had to continue, with whatever vessels were put at our disposal, to carry cargo in all of our routes.

The Court: You operated under an agency agreement with the Washington Administration?

The Witness: Yes, we did, general agency. The only exception to that was the period where the submarine menace made it necessary to transfer or erations from here to the Gulf.

Q. I think the Court was particularly interested in any comparisons between peacetime and wartime, with respect

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to the proportion of overtime and straight time that was put in on the vessels. A. Well, in war time in this port the fact that piers were at a premium and that ships were at a premium meant that we had to work whatever equipment we had to fullest capacity. Therefore, to secure greatest efficiency we tried to keep those vessels which. were going in a particular trade with any regularity at: our own terminals, and to get them out on convoy dates as soon as it was humanly possible to so.

By the Court:

- Q. That meant more overtime? A. Oh, absolutely it did.
- Q. As a matter of fact, you operated overtime more extensively during the war? A. We certainly did.

By Mr. Taylor:

Q. That fact was a wartime abnormality? A. The regularity of it?

Q. Yes. A. Yes, I would say so.

The Court: You also suffered from a shortage 297 of manpower?

The Witness: Yes, we could have used a lot more men if we could have found them.

Q. You are familiar, of course, with the Collective Bargaining Agreements here in court! A. Yes, sir, I am.

Q. And were you familiar at all with the negotiations of the various agreements as they were going on? Yes, I was.

Q. What can you tell us, Mr. Iglehart, about the reasons, if they exist, why shipowners did not want to work overtime? A. Well, from a shipowner's point of view it meant paying a premium over the ordinary rate of wage in the normal working day. In addition to that, I am certain in my mind that we don't get the same efficiency working at night that we do in the daytime.

Q. You heard what Colonel Warwick had to say about

that, did you? A. Yes, I did.

Q. And is what he said in accordance with your own observation and experience? A. Very substantially, yes.

Q. With respect to the attitude of the men, the long-shoremen and their union, as to whether or not they wanted to work nights, what can you tell us about that from your knowledge? A. Well, I think that our particular service is more an exception rather than the rule of the port, and I think that in view of the fact that we did work a good deal of overtime that we attracted men to stay with us, and it attracted men to work a certain amount—I think most of the men wanted to work a good deal of overtime.

The Court: The men did want to work overtime! The Witness: Yes.

Q. That is, your company—they knew that for the reasons you told us, your passenger schedules and mail schedules, and so on to be met—that you did in fact work a considerable amount of overtime on the Grace Line boats, you think more than perhaps any other concern that you know of in the port, and that was known to the men? A. That is correct.

Q. And that was the place to which men who might want to work overtime when overtime was available naturally came? A. I am referring to the wartime years again.

The Court: Yes, as far as you found the menthat you employed, they were eager to work nights!

The Witness: I wouldn't say eager. They were

willing to work nights. I would say in peace time the majority of the men would not wish to work nights.

Q. How did they indicate that? Why do you say so? A. Well-this is only hearsay.

> Mr. Goldwater: Then I will Shject to it, of course, your Honor.

Q. You walked into that one with a lawyer in the courtroom. Tell us what you know about it yourself. A. From 302 my own knowledge, then-

Q. I assume that you can include-

The Court: Let me decide whether what you will say is hearsay within the hearsay rule.

Q. Yes, you know what is going on in the port. Tell us what you know. A. There was a great deal of difficulty in the port as to overtime. Some men wanted to work exclusively overtime, because of the money involved. In our case we never had that particular-I don't recall any instances where we had any difficulty on that account. 303 If we wanted to work certain gangs—a certain number of gangs-overtime, they were ordered to work overtime, or straight time. They worked in straight time. We had never had any particular difficulty with anybody demanding to work overtime, or demanding to work straight time during the war period.

Q. How about the attitude of the men? A. I would say the majority of the men, without any question, would prefer not to work at night.

Q. What was the attitude of the stevedering companies with respect to whether they wanted to have the men work overtime or not? I mean now not your company,

which is a subsidiary, but the general contracting stevedores who had their contracts on a cargo tonnage basis? A. Well, from my own experience, if you work men for long hours you will not get the same efficiency and the contracting stevedores would certainly be interested in working straight time only if their livelihood depends on it. I have not had experience as a contracting stevedore, so I can't talk as such.

Q. I see. Is it true throughout the port generally, as between contracting stevedores and steamship companies, that the contracts provide that the stevedore must get permission to work overtime? A. That is correct.

Q. And that was true during the war also? A. That is correct.

Mr. Taylor: Your witness, Mr. Goldwater.

Cross Examination by Mr. Goldwater:

Q. Mr. Iglehart, I would like to ask you first whether you participated in the negotiations for the Collective Agreement which became effective on October 1, 1943? A. Yes, I did.

Q. Were you one of the committee of the- A. Yes.

Q.—of the Shipping Association here? A. Yes, that is right.

Q. Weren't you at that time engaged in the War Shipping Administration! A. No, not—you said the 1941 to 1943 contract?

Q. No. I am talking of the one that became effective October 1, 1943. A. I did not work full time for the War Shipping until the spring of 1944. I worked part time in the New York office of the War Shipping Administration.

Q. And you devoted the rest of your time to your private— A. That is correct.

Q. —connection with Huron and Grace. A. That is correct.

Q. Then you did participate in that Collective Bargaining Agreement? A. I did.

Q. Did you participate in any previous collective agreements? A. My recollection is that I participated in one previous.

Q. Would that be the one that was effective on October 1, 1941, that is, two years previously? A. That is correct.

Q. And were you familiar, without having participated in that, with any contracts with the Longshoremen's Union in this port previous to that time? A. In a general sense. Q. Well, were you familiar with the rates of pay that were paid for the so-called straight time, that is during the hours of 8 a.m. and 5 p.m., and the rates of pay which were paid for all other hours of the day, or night work? A. Not without reference to the contracts.

Q. Do you mean without reference to it you can't tell me what the rates were in each of the contracts? A. I could not.

Q. And you cannot now recall whether the rates changed from one contract to another? A. I know they did change, but I couldn't give you the amount or the exact date when they did.

> Mr. Taylor: When you say "contracts", you 309 mean the Collective Bargaining Agreements? Mr. Goldwater: Well. I am talking about them.

. Q. You understood those are the contracts I am referring to, Mr. Witness? A. Right.

Q. Now, do you know whether there was any change in the relationship of pay between day and night work, or day work and so-called overtime work from year to year as these contracts were rewritten? A. I wouldn't want to say for sure, but my recollection was that there was the same relationship in those two or three periods.

Q. And what is your recollection as to that relationship?
A. It was time and a half—50 per cent above the normal rate of pay.

Q. That is the time over what was called straight time-

A. That is correct.

Q.—which applied to all hours beyond 5 in the evening was 50 per cent more than the pay for straight time hours? A. That is my recollection.

Q Now, your company had a number of men or gangs which worked nights only, did they not? A. That is cor-

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Q. Had you anything to do with the employment of gangs at any time? A. Myself?

Q. Yes, yourself. A. No.

Q. Did you have, in your experience in the shipping industry—I notice that you have testified that you had worked through various phases of the business. A. I never had that particular experience.

Q. That particular experience you have never had? A.

No.

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Q. Do you know of your own knowledge whether men who worked for consecutive weeks, two, three, four or five, during the daytime, were ordered to work a week of night work every so often? A. You are speaking of the period of the war?

Q. Yes, during the period of the war. A. I think it is

quite probable.

Q. Have you any knowledge of the regularity with which that occurred? A. I don't think there was any regularity during the war period, no.

Q. But every so often a day gang would be told they were required to work night time? A. That is correct.

Q. That was not an exceptional thing, though, was it? A. No. I wouldn't say so.

Q. What is your knowledge with respect to regularity with which men worked Sundays during the war period? I

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am talking now of 1943, 1944 and 1945. A. Well, as I said before—

Mr. Taylor: Is this question directed to his own company or generally, Mr. Goldwater?

Mr. Goldwater: Well, I would like to know as to both. I am glad that you called that distinction to my attention.

Mr. Taylor: Suppose you break it up into two parts.

Mr. Goldwater: That is right.

Q. Suppose you tell us first what the condition was with respect to your own company. A. There was a considerable amount of Sunday work—there is no question about it—on our own terminals. As to the rest of the port, I would not like to speak—

Q. Did any of your experience with the War Shipping Board in the course of your duties there supply information as to the practice in other companies? A. Well, for a period during 1944 on it did. In that period there was a good deal of Sunday work.

Q. With other companies as well as your company? A. That is correct.

Q. Before I leave that subject, may I ask you whether you would give the same answers with respect to holidays, both as to your company and other companies? A. Yes, I would say so.

Q. There was a considerable amount, in other words, both with your own company and other companies, of holiday work? A. Well, we certainly would not wish to work Sundays or holidays unless it was absolutely necessary.

Q. That is not the question. The question is, as a fact there was a considerable amount of work in your own comcompany on holidays and Saturdays?

Mr. Taylor: Which is it?

By the Court:

Q. Just in your own company you said the answer is yes? A. Yes.

Q. And in the port generally? A. The period that I know of there was considerable.

Q. You know about the period in 1944? A. Part of it, yes.

By Mr. Goldwater:

Q. Do you know about the period of 1943? A. No, I don't.

Q. Do you know about the period of 1945? A. No, I do not.

Q. Only in 1944, and what months in 1944 are you alluding to? A. May through, say, August.

Q. From May through August? A. Yes.

Q. Now you referred to the overtime subject generally in your comparison between work before the war and during the war period, and said that there was abnormality in the wartime period? A. That is correct.

Q. With respect to so-called overtime! A. That is cor-

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Q. In answering questions on overtime in response to Mr. Taylor, did you have in mind any distinction between overtime in the sense of an hour or two or three or (four, or more, worked by a man after the completion of his day-time stint and time worked beginning at a night hour? A. No, I did not make any difference.

Q. You made no distinction? A. I am not entirely clear as to the question.

Q. Well, in answer to Mr. Taylor's question you answered him with respect to overtime generally, and he referred just to overtime. He made no distinction in his questions, or indicated none, between work by men who had worked a full day and then continued an hour, two, three,

four, five or more, and men who began after 7 in the evening. A. My answer was based on the number of hours worked in excess of the normal day.

Q. You mean that you had no reference to hours as overtime worked by men who began after 7 in the evening? You were not thinking of them at all in answer to any of his questions? A. That was working overtime; that was included in my answer.

Q. You would call that work overtime, even though it only began at 7 at night or 8 at night? A. Yes; it is beyond

the normal working hours.

Q. Beyond what normal hours did a man work who started at 6.55, at the 6.55 shape-upd Beyond what hours did he work? A. He worked entirely in overtime hours.

Q. It was not beyond any hours, was it? He began at

the 6.55 shape? A. In a sense, yes.

Q. They were not hours worked beyond anything then, were they? They were beginning hours; isn't that true? A. They are worked in overtime hours, as far as our working agreement is concerned.

Q. That is the point. Then you call them overtime hours because the contract calls them overtime hours? A. No, I

don't.

Q. Why do you call them overtime hours? A. Because 321 the normal working day is 8 to 5, and they were working hours other than those.

Q. Is the supposititious case which I put to you, a case in which a man worked during the daytime-did you understand it to be that case? A. No, I did not.

Q. Then I ask you again what hours did he work beyond

the normal hours of the day for him?

Mr. Taylor: I think you have got to define the word "beyond" as you are using it in your question.

Q. You understand the question, Mr. Witness? 'A. As far as I know I answered it to the best of my ability.

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The Court: I think even I understand it by this time. It is very clear that the term 'overtime' in this contract—

Mr. Goldwater: I want to know whether the witness, when he uses the word "overtime" is using the term because it appears in the contract designated that way.

The Court: In other words, a man who worked only nightly five days a week 40 hours time would get paid 60 hours?

The Witness: That is correct.

The Court: Despite the fact that he only worked 40 hours, and in one sense he did not do any over-time work but in another sense did all overtime.

The Witness: That is correct.

The Court: That is the sense in which you use it?
The Witness: That is correct.

Q. Is the sense in which you say he did overtime work the sense which has reference to the rate of pay that he got?

Mr. Taylor: I object.

The Court: Objection sustained, only because it is repetitive. I think it is perfectly clear, and I do not think there is any controversy between you two gentlemen on the subject.

Mr. Taylor: Not the slightest. He asked the question for the sake of emphasis, but I am sure your Honor got it a long time ago.

Mr. Goldwater: I do not want the testimony, on a record which will probably be appealed, to be the slightest bit confusing.

The Court: I do not think there can be any remote doubt that the term "overtime" in this controversy does not mean hours in excess of 40. It may mean that, but it may also mean, and generally means, hours outside of the scheduled hours of 8 to 5.

Mr. Goldwater: But something more; it does not mean hours worked by an individual on any day in excess of eight hours, either.

The Court: That is right.

Mr. Goldwater: I would like to know whether the witness agrees to it.

Mr. Taylor: Oh, we all know that. Can't we get along with the case?

Mr. Goldwater: We can when the witness answers the question.

Mr. Taylor: He has answered it a half a dozen times.

The Witness: That is correct.

Mr. Goldwater: The witness says that is correct.

Q. In answer to one question, if I heard you correctly, you said that you had no trouble with men working nights? A. No, not particularly.

Q. And you said some men wanted to work nights? A. I

think that is correct.

Q. And you said that they wanted to work nights because of the premium pay; do you recall using those words? A. I.do, but I think it may have been an assumption on my part.

The Court: And some men want to keep out in the sun. That is possible.

Mr. Taylor: I have no doubt that is what directs a good many of them when there is work to be done.

Mr. Goldwater: That is all.

Re-direct Examination by Mr. Taylor:

Q. About the matter of straight time pay, overtime pay, and whether overtime pay is always time and a half straight time pay, while you did not go into figures, I

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think you answered Mr. Goldwater to the effect that as you recall the contracts the overtime rates are always time and a half the straight time rates? A. I think he asked me about specific agreements, and my recollection on those was it was time and a half.

Q. But you are familiar, are you not, with the fact that there is a group of four kinds of so-called penalty carge, with respect to which it is the custom here, and is also provided in the agreement, that a differential of 5 cents or 10 cents or 15 cents is added above to the straight time rate of pay, and the overtime rate of pay? A. Yes.

Q. And you knew that? A. Yes, I do.

Q. But the reason you answered the question as you did was because you and the other folks, so far as you know, regard that as essentially part of general cargo carrying the straight time rate of \$1.25 and the overtime rate of \$1.875, with the added differential in either event!

A. I assumed in answering the question we were talking about the basic longshore rate.

The Court: Where a man did a normal day's work, 8 to 5, but in the aggregate it added up to more than 40 hours, would you then give him time and a half!

The Witness: We certainly did.

The Court: Although that is not covered by the I. L. A. agreement?

The Witness: No.

Re-cross Examination by Mr. Goldwater:

Q. What did you mean when you said in answer to his Honor's question that when a man worked over 40 hours you then paid him overtime? Will you illustrate for me? A. I assumed that you were referring, your Honor, to the compliance with the Fair Labor Standards Act.

The Court: That is right.

The Witness: We do comply with the Fair Labor

Standard Act.

The Court: He wants an illustration of where you do that, a suppositious case.

Q. I want what you did factually. A. As an exemple, the bargaining agreement with the I. L. A. provided for 40 hours a week. If a man worked 40 hours between Monday 8 a. m. and 5 o'clock on Friday, we would pay him time and a half for the period 8 a. m. to noon on Saturday.

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The Court: Although that was not so stated in the contract?

Q. Will you tell me, at time and a half, what would you pay him? A. The rate of pay for the normal working day.

The Court: In other words, you paid him \$1.875 for those four hours, instead of \$1.25?

Mr. Taylor: If he was working on general cargo. The Witness: Yes.

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- Q. That is what we are both talking about. What would you pay him if he worked as a header, do you know? A. I am not dead certain of this, because I have not actually seen our recent records, but my recollection is that we paid the same premium in straight time—in overtime as we did in straight time.
- Q. You mean you added the premium to what you call overtime?

The Court: Not time and a half on the pre-

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The Witness: I am not too certain, but my recollection is we did.

Re-direct Examination by Mr. Taylor:

Q. I want to follow that up a little bit more. If it so happened that he was working in those Saturday morning hours, having first worked 40 straight time hours during the week, and he was working Saturday morning on explosives, we will say, which carry a \$3.75 overtime rate, you would pay him \$3.75, wouldn't you? A. That is right.

Q. And if he was working under such conditions on a Saturday morning handling kerosene, which carries in this book here \$1.45 straight time and \$2.175 overtime, you would pay him at the \$2.175 rate? A. On what commodity!

Q. Kerosene. A. Yes.

Q. So can we boil it all down and settle it once and for all that if you had to pay him or did pay him overtime hours on Saturday morning because he had worked 40 straight time hours Monday to Friday inclusive, you paid him at the overtime rate stated in the Collective Bargaining Agreement? A. That is correct.

The Court: Supposing he did 40 hours of night work and then he did four more hours on Saturday morning, did you pay him time and a half or did you pay him \$1.37, or did you pay him two

The Witness: \$1.875.

The Court: That is what you paid him? The Witness: Yes, sir.

Re-cross Examination by Mr. Goldwater:

Q. That is an important question, and I hope you will understand the spirit in which I ask you to consider it

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again. I am quite sure you understood his Honor's question, and I say this advisedly, because from the records we have seen we think the fact is different. I am calling it to your attention only for that reason. A. I have not examined the records.

Q. I would like to have you put a positive answer on the record. A. The actual time sheets I have not seen.

Q. You understood the question? A. I understood the question to be that within one working week a man worked 40 hours.

The Court: 40 hours of night work, and then on Saturday morning in addition; what did you pay him for the 40 hours and Saturday morning?

The Witness: 1 said \$1.875.

Q. You have not looked at the records recently? A. I have not, no.

Q. Would you be kind enough to examine the records?

Q. And will you let Mr. Taylor know if you would like to change that answer? A. I will.

Q. As I would like the record to be accurate with respect to that. A. Yes.

Q. Did your company handle any explosives? A. Not. as stevedores, no. We may have handled isolated lots, but we do not as a usual matter handle explosives.

(Witness excused.)

LAWRENCE C. HOWARD, called as a witness on behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Howard? A. Niantic, Connecticut.

Q. And your business is what? A. Steamship steve-doring.

Q. Here in New York? A. Our home office is here in. New York, although we function at various ports on the Atlantic Coast.

Q. What is the name of your company? A. The stevedoring company is Nacirema Stevedoring Company.

Q. Will you please tell us about your experience with ships and stevedoring and so forth? A. I have been in the stevedoring and steamship business for about 37 years, part of the fime as master of a ship, running a stevedoring company and superintendent of a dock; and during the war years I acted as consultant to the Army and also to the Navy on stevedoring matters.

Q. What does that mean? A. Acting in an advisory capacity in the preparation of stevedore contracts, and the general administration; also checking on the operations.

Q. In what part of the country? A. The Atlantic Coast, Gulf and Pacific, and this year I also made a survey of the labor and stevedoring conditions of the port of Honolulu.

Q. I want to ask you some questions about straight time and overtime business. I am going to make it very general and allow you to tell it in your own way, if there is no objection, so I will ask you to tell us, if you will, Mr. Howard, speaking now with respect to the conditions prevailing in the port of New York prior to the war

years, what the practices were with respect to working overtime along this waterfront here, the attitude of the steyedores and the men, the extent that there was overtime, and so forth; just tell us about it in your own way. A. As far as the steamship companies were concerned, they were opposed to it on account of the extra cost. The contractor would be opposed to it on the ground that he could not get the production from his men. As a matter of fact, in our own experience we estimate that we should have at least 20 per cent over and above the straight time, that is the commodity rate based on straight time, when we work overtime hours, As far as the men are concerned, I think that without question there are a few that would want to work for the dollar, but I would say that by far the majority would prefer not to work nights, and the way it worked out in actual practice was, I believe, that most steamship companies in preparing a voyage schedule worked it out on the basis of 24 hour steaming days at sea and eight-hour days in port. They would have to do that. If they did not they would not have anything to fall back on in the case of emergencies and delays of the ship from various causes, so that the only overtime was that which was absolutely necessary in order to keep the ship on schedule.

Q. Are you in position to tell us about what I will call the official union attitude on the matter of overtime as distinguished from the personal inclination of some ambitious men who would like to get as many dollars a week as they could? A. You mean the official position of the union?

Q. With respect to overtime, and whether the men should or should not work outside of the so-called normal day! A. It is obvious, it is in the agreement, that the men shall work nights when required, and I think their attitude would be the same as that of the steamship com-

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pany and the contractor, that they would sooner not see the work done unless there was an actual emergency.

Q. That is, the provision in there which says men shall work at nights, Sundays and holidays when required, was something which the employer put in in order to overcome the inclination of the men not to work at night? A. That is right; I think it was put in there in the event it was absolutely necessary to do this work.

Q. How about the provision in there that says if you order men, or try to put them to work at 7 o'clock that night when they have not been working before that day, the provision that if you do that you have got to pay them four hours of work. What was that put in there for? A. That was to make as sure as you could the men would show up, but I have seen plenty of shapes at ? p. m., where men had promised to come back where they just did not come.

Q. How about war time compared with peace time; what is the difference, and why? A. As Mr. Iglehart pointed out, there was an extreme shortage of berths and port docks. There was a shortage of ships, and everything went into the pot as far as money was concerned in getting the ships turned out and the decks cleared. That is, there was no regard paid to the economy of operation as far as time and material were concerned.

Q. But it is still true, as some of the other witnesses here have said, that you had to consult the War Shipping Administration and the Army and Navy? A. Always, but that was their invariable order, to turn the ship around and get her out and work the overtime, but we had to have the approval to be sure of collecting our money.

Q. Has your company followed the practice of paying the men according to the Collective Bargaining Agreement, with the modification that where they have worked 40 straight time hours, Monday to Friday inclusive, you

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then pay them an additional amount for such time as they work on Saturday morning at the contract overtime rates? A. That is right.

Q. As far as you know that practice has prevailed

throughout the port? A. That is right.

Q. Did you ever have any complaints, or hear of any complaints, until these suits were brought, on the part of either the union or employees, from the following of that practice?

Mr. Goldwater: Objected to as immaterial.

The Court: It is immaterial. However, you 350 may answer it.

A. Never.

Cross Examination by Mr. Goldwater:

Q. You have said, Mr. Howard, that, as I understand it, the chief difference between the conditions before war time and after war time with respect to this pay, overtime, was that there was no regard paid to economy of operation after the war. A. I beg your pardon, I said during the war.

Q. I mean during the war. I mean after the war began.

We are talking of the same thing. A. Yes.

Q. And that your orders then were to turn the ship around and get it out? A. That is right, in the majority of cases. Of course there would not have been any sense to do a thing of that kind where you had two weeks of repairs.

Q. We are talking about the normal case. A. We were

trying to make the convoy dates.

Q. Did not the economy of operation prior to the war dictate to the companies that the best thing for them to do was to get their cargo off and get their new cargo on and turn the ship around and get it out as quickly as

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possible? A. That kind of turn-around in normal times is always desirable, but that does not necessarily mean you load that ship down with day and night gangs and work it 24 hours a day.

Q. I asked you whether or not economy of operation did not dictate to the companies getting the cargo off and on as quickly as possible and getting the ship out? A. With other factors taken into consideration.

Q. What other factors? A. For example, a ship coming in from a long voyage might take ten days to two weeks for voyage repairs. There would be no object in loading that ship while she was still under repair.

Q. Of course not. That is not the normal case. You said a moment ago that that did not apply to ship repair cases. A. Oh, I beg your pardon, I did not mean to say that.

Q. Then go on. A. There will be other conditions—availability of cargo and the limited capacity of the dock facility where you are unloading, that you can only unload at a certain state. Ordinarily you would not work more than 10 to 20 per cent of the vessel's capacity outside of the normal working day of eight hours, because your schedule is predicated where you make it up weeks and months in advance, on an eight-hour work day as far as working cargo is concerned, with the idea of only going into overtime in case of unforeseen conditions of emergency.

Q. What happens when you make up your schedule weeks and months in advance and the ship does not get in on time? A. That is a question to decide then, as to whether you change your schedule, or whether it is better to work more overtime and get her to sea. And there also, again, your voyage repairs come into the picture.

Q. Let us leave repairs out? A. They are something that is with us all the time.

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- Q. Do you know of cases where your cargo arrangements are under contract to get your delivery at a certain time at a certain port? A. There are such cases, but that is mostly in connection with chartered vessels, where they have what they call dispatch and lay days, but on a regular berth service it is a question of supply and demand. You might get a promise that you would get it, and it might not come through sometimes for hours or days afterwards.
- Q. Do you lose out with your contracts and your connections when you do not keep your promises for a long time? A. Regularity of service is always an asset in the securing of cargo.

Q. Then in order to meet schedules it would be in the interests of the company to work nights if your ship came in late? A. We do that, within reason.

Q. Is it an unusual thing, even in peace time? A. It is unusual to work an abnormal amount of overtime. would say anything over 25 per cent of the vessel's working capacity would be getting to the point of where it would probably be better to change your schedule and save the money.

Q. But you would not call working overtime up to 25 857 per cent abnormal, then? A. No, I would not. I am not thinking of the fast passenger liners, but about the medium ones, combination passenger and freight, somewhere in the middle between the tramp and the liner.

Q. How far back are you familiar with these rates of pay for so-called straight time and overtime? A. I have been on the New York waterfront since 1923, and any time I want to know anything about rates I take a little book out and look it up. I do not try to memorize it.

Q. Let us see if your recollection would agree with what I say to you. If it does not you will say so, of course. What is the relationship between the overtime and the straight time pay? A. You mean presently?

Lawrence C. Howard-For Defendants-Cross.

Q. Yes. A. Time and a half.

Q. What was it in 1943? A, I do not recall specifically. I think we have been on time and a half for a few years, but I remember very well that it was something less than time and a half.

Q. How much less was it? A. I do not know. I am

not even sure it was less.

Q. Have you any recollection when there was a time when it was more than time and a half? A. It is possible, but I do not recall. I might say that I have never sat in on the committees on the actual negotiations of these wage rates. I am familiar with them from the operating point of view, but not from the negotiations point. If I had been on the committees I would have had a better memory as to just what these things were.

Q. Assume that at one time the night rate was double the day rate. A. I think that might be possible. I know

in 1881 they did not have any overtime at all.

The Court: Do you know that from hearsay?

The Witness: No sir; I have a record in my office.

The Court: You did not personally participate?
The Witness: No, sir, I did not personally participate in that.

Q. You say you know what it was in 1881. A. I say I know there was none in 1881.

Q. Do you know what it was in 1874! A. No. I have

Q. Weren't you interested in knowing beyond that? A. I am always interested in reading anything I can get on the subject.

Q. Where did you get the book that shows you there was no overtime in 1881? A. My partner has it in the office. He has a lot of old stevedoring records.

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- Q. But his library does not go back to 1874? A. I think it does. I think the company I am speaking of was founded in 1875, and I think they have some of the old records down there.
- Q. You may be interested in what it was in 1874. A. I would like to know.
- Q. Do you know the relationship prior to the war was approximately one and a half times? A. I don't know.

Q. You don't know that? A. No.

Mr. Goldwater: That is all.

Mr. Taylor: That is all.

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Before I call another witness, I would like to get the record straight on the matter of what the rates of straight time pay and overtime pay have been in this port, as shown by the exhibits which are already in evidence.

The Court: Is there any dispute about it? The questions were purely to test credibility and memory of experts:

Mr. Taylor: You do not know whether it tests the recollection or not until you know the fact, so I will now state, subject to contradiction by Mr. Goldwater,

The Court: Are they covered by stipulation?

Mr. Taylor: They are in the evidence by stipulation, and they show that at no time since May 3. 1916, have the overtime rates been less than time and a half the straight time rate.

Mr. Goldwater: I am glad you supplied for me what the witness could not, because it is obvious now that there was no difference, which is the point I tried to make—no difference between the relationship prior to the war and after the war, or prior to the Act and after the Act.

The Court: I understand.

(Short recess.)

Frank W. Nolan-For Defendants-Direct.

FRANK W. NOLAN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Now, Mr. Nolan, I guess we are back where we were a few moments ago. What is your name, sir? A. Frank W. Nolan.

Q. And where do you live? A. I live in South Orange, New Jersey.

Q. What is your business? A. Stevedoring. President 365

of a stevedoring company.

Q. What is the name of your company? A. Jarka Cor-

poration.

Q. How long have you been connected with that corpora-

tion? A. A few months short of 25 years.

Q. Does that 25 years include all of your period of activity on the waterfront here in the stevedoring industry? Have you always worked with them? A. In stevedoring, always for the one corporation. I was in the steamship line business for the preceding two or three years. Prior to that time I was in the Navy during the last war. >

Q. What is your position at Jarka? A. President.

Q. What sort of a company is Jarka? How big, what sort of operations and so on? A. Well, it handles a considerable volume of business, I wouldn't care to say how much.

Q. It is one of the big ones here in the port, is it not? A. I think perhaps it is.

The Court: I will take judicial notice of it.

Q. Have you any special position on behalf of the contracting stevedores in the Port of New York with respect to the matter of union contracts, that is, negotiations and agreements from year to year? A. Well, I am a member of the Conference Committee of the New York Shipping Association, as a parallel to my position as Chairman of the Stevedoring Committee of the Maritime Association, and there are three members of the Maritime Association, Stevedoring Committee who join with the New York Shipping Association Conference Committee in the preparation of the wage agreement.

Q. How long have you fulfilled that function? A. Eight years.

Q. You consider yourself informed as to the union purposes, at least, as they have declared them in the course of these many negotiations, do you not? A. I think so.

- Q. Well, then can you tell us in your own way what the attitude of the union is with respect to overtime and the way in which the contract provisions with respect to overtime are set up? What are they trying to get at? A. The reaction of the union representatives can be summed up in a few words: We either have regular time during the period under discussion, as I assume, forty-four hours, 8 to 12, and 1 to 5, on weekdays, Monday to Friday inclusive; 8 a. m. to 12 noon on Saturday, and all other time is overtime.
- Q. Why did they want it classified in that way? What is the purpose of overtime in the industry? A. The purpose of overtime—

Mr. Goldwater: Whose purpose?
Mr. Taylor: The union's purpose.

A.—well, I would say basically to get the benefit to its membership of increased income when and if they are called upon to work outside of the regular or straight time hours prescribed in the agreement.

Q. What if any purpose has it with respect to confining the work to a normal working day? A. Well, the union has maintained quite frequently that they only want to work straight time. Of course, they want to estrict the amount of straight time, which, of course, likewise makes more overtime.

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Q. If the overtime is only 5 cents an hour would you work more overtime than you do now? A. I would say quite assuredly so.

Q. Does the fact that you have to pay these high rates dissuade you from working overtime? A. I would say so.

Q. To what extent? Can you generalize as to the attitude of the steamship companies and stevedores with respect to working or not working overtime hours? A. Well, the steamship lines insist that we as stevedoring contractors utilize every available straight time hour for work on the ship consistent with weather conditions, exposure of cargo and the availability of cargo. They insist, if the facilities are available, that we employ maximum gangs on the ship during straight time. I think that answers it, so far as I know.

Q. All right. It does certainly answer it from the point of view of the steamship company. Now, what if any difference does it make to the stevedoring company whether, they work overtime or not? A. Well; we basically want to work the maximum amount of straight time anyway.

Q. Why? A. Well, if we are working men for eight hours and we have to lap over into overtime, we get less work performed. There is a fatigue proposition which you cannot escape. The productivity after a certain number of hours is on the downhill.

The Court: How about a new gang coming on at 5 o'clock or 7 o'clock, would they suffer from the same fatigue factor!

The Witness: Not so, your Honor, unless perhaps those men have worked during the day as well. We have no way of knowing that.

The Court: For another stevedore?
The Witness: Yes, your Honor.

Q. Aren't there a few other reasons, such as difficulties in locating gear and the difference in—

Frank W. Nolan-For Defendants-Direct.

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Mr. Goldwater: You mean the few other reasons that you are suggesting?

Mr. Taylor: Yes, surely.

The Court: At this stage of the proceedings I think we can dispense with leading.

Go ahead and answer the question, please.

A. We know that we have to utilize every regular time hour in the day. That is a fundamental requirement.

The Court: Do you make more working overtime or do you make more money working straight time?

The Witness: We make money, if any, your Honor, working in straight time. We get the best production during daylight hours.

Q. Your company works on a commodify tonnage basis? A. That is correct, with the exception of the war period when some were not.

Q. And the overriding which you get when you work per minute overtime does not take care of anything other than your actual disbursements for overtime? A. That's right.

Q. Plus your insurance premiums? A. That's right.

The Court: Before the war, Mr. Nolan, what percentage of the work of the Jarka Company was put out at overtime or at overtime rates?

The Witness: I would say, youseHonor, about

25 per cent.

The Court: About 25 per cent?

The Witness: Yes, 75 per cent in straight. time, as I remember.

Mr. Taylor: We will be able to give you those figures precisely.

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Frank W. Nolan-For Defendants-Direct.

The Court: That is, 25 per cent of the hours?

The Witness: 25 per cent of the hours, yes.

The Court: You do not mean 25 per cent of the pay?

The Witness: No, sir, 25 per cent of the hours.

Q. The contract, as you know, that is, the one for the years 1943 to 1945, sets up a 44-hour week. The question is, why was no change made in the contracts in view of the fact that the Fair Labor Standards Act sets up a maximum work week of 40 hours as the regular rate of pay? Why did you retain Saturday morning as the straight time period under the contract? A. Well, there is a different view, may I stress here, between the Wage and Hour 40-hour limitation and a potential 40 hours within any 44. When I specify the working hours from 8 to 12 and 1 to 5 on weekdays, Monday to Friday inclusive, and 8 to 12 on Saturday there may have been cases where the men did not work at all on Monday.

The Court: In which case they would only get straight time for Saturday morning?

The Witness: That's right.

The Court: Does the contract say 44 hours or does it just designate the day!

Mr. Taylor: It says 44 hours on page 2, I

The Witness: We may have had men, your Honor, who started to work straight time on Wednesday morning.

The Court: Yes, of course I understand that.
The Witness: Some, as a matter of fact, only start to work on Friday morning straight time, and the inference was to allow that 4 hours on

Saturday morning as a straight time working period, and I may go one step further: to permit the men to get that employment on Saturday morning which otherwise they may not have.

Q. You mean that if you had set it up on a 40-hour centractual normal week, 8 hours, Menday to Friday inclusive, which would thereupon put Saturday morning into overtime, you would avoid working them on Saturday morning? A. It may have dissuaded an owner from working them Saturday morning.

The Court: How did you pay them? Did you pay them time and a half for those four hours if in fact they had already worked 40 hours?

The Witness: If they had worked 40 hours straight time I paid them overtime Saturday morning.

The Court: Supposing they had worked 40 hours night work and then worked 4 hours Saturday morning?

The Witness: We paid them straight time.

Mr. Taylor: I was going to ask that.

The Court: In that respect you differ from the last witness.

The Witness: I was not here when he testified.

Q. The question that was asked, I might say, of Mr. Iglehart, and he was not sure about it, was with respect to the pay on Saturday morning if they had worked 40 overtime hours in the week and he said it would be \$1.87½. You say that is not true but that it would be \$1.25? A. The regular base rate of pay was, \$1.25 for Saturday morning.

Q. In other words, the only time in this port under the 1943-45 agreement where a man would get \$1.871/2

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Frank W. Nolan-For Defendants-Direct.

Saturday morning would be when he had worked 40 straight time hours earlier in the week? A. That is correct, sir.

Q. Mr. Nolan, I am calling to your attention a statistical chart which has been admitted in evidence here

Mr. Taylor: The document in front of the witness, your Honor, is a copy of Defendants' Exhibit D, and I also would like your Honor to have before you the original of Defendants' Exhibit E.

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Q. Directing your attention first of all to the exhibit which is marked Defendants' Exhibit. E and which is entitled "Statistical Analysis of Work Hours of Longshoremen in the Port of New York from the payroll period nearest November 1, 1938 to the payroll period nearest August 31, 1939," I call your attention to the fact that in the lefthand column there are 17 code references under the caption "Company."

Now, will you tell us how those 17 companies were selected, as far as you know, for the purposes of this statistical study? A. Well, as I recall these details and study they were gathered from a group of companies that constituted, as I remember, 70 per cent of the volume

of activities in the port during that period.

The Court: You told me, I think, which were the two defendants in this case, but I no longer remember.

Mr. Taylor: The Huron is K.
The Court: There is no K.
Mr. Taylor: It is K—A.
The Court: That is Huron?

Mr. Taylor: Yes, that is Huron. And the Bay Bidge Operating Company is O-A. With respect to that, I call your attention to the footnote which shows that some of them were limited in period, the reason being, as evidence will later show, because of lack of records for the period covered in the study.

Q. Those companies were selected, as I understand it, in conference between yourself and Mrs. Schleifer of the War. Shipping, and Commander Evans and Mr. Lyon. You all got together on it in order to get a group of companies which in your opinion were a representative sample of the port! A. That is correct.

Q. From your knowledge of those companies and their operations, would you say that the information contained on that chart and the average figures which are at the bottom of the column are typical and representative of conditions in the port of Greater New York! A. At that time?

Q. Yes, for the period covered. A. Yes, sir.

Mr. Taylor: In order to make sure that your. Honor has seen how this thing works—

The Court: I see it. I can follow you.

Mr. Taylor: And for the purposes of the record, I would like to get in some of the relationships and figures which are shown by this chart.

The Court: You can do it in your brief. You do not have to do it on the record. You may do whichever you wish.

Mr. Taylor: I would like to emphasize, for instance, the fact that according to this study the percentage of straight time man-hours to total man-hours—that is column 3—is 75.03 per cent.

Frank W. Nolan-For Defendants-Direct.

The percentage of overtime man-hours to total man-hours—that is column 5—was 24.97 per cent in this period.

The Court: That would indicate that Huron

was atypical in this respect.

Mr. Taylor: Yes, they were.

The Court: 47.63 per cent?

Mr. Taylor: That is right, and that coincides, I should say, with what Mr. Iglehart pointed out this morning: that his company was perhaps the one that worked more overtime than any other company in the port.

The Court: The Bay Ridge is also atypical as being at the bottom of the scale or near the

bottom of the scale.

Mr. Taylor: Yes, subject, however, to the qualification which I called to your Honor's attention, coveing only a portion of the period.

The Court: Yes.

Mr. Taylor: In column 7 you get the percentage of total overtime which was worked on Saturday afternoons, Sundays and holidays, and you see that it is '7.8 per cent of the total man-hours, and it is 28.35 per cent of the total overtime hours.

Then you come to a very interesting series of columns in which the overtime work after 5 o'clock in the afternoon and before 8 o'clock in the morning is broken down according to the number of straight time hours which a man had worked before working overtime; that is, for working nighttime overtime.

In column 12, for example, you have the number of instances and the number of man-hours worked between 5 p. m. and 8 p. m. by men who had al-

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ready worked from 6 to 8 hours straight time in the same day. You see that that makes up 57.81 per cent of the total of overtime worked at night.

And carrying it on further, to the right of the chart, you find in column 24 a statement of the number of instances and the total number of manhours worked by men between 5 p. m. and 8 a. m. in the morning who had not worked any straight time during the day, and you find that they as a group accounted for only 4.17 per cent of the total manhours worked in the period and only 16.69 per cent of the overtime worked during the nighttime hours.

Mr. Goldwater: No, that is not correct.

The Court: He was reading from 27.

Mr. Taylor: That is right. I beg your pardon, I did misread it. Well, the references are clear. I am just calling your Honor's attention to it.

The Court: There is one column that you do not have, and that is, what percentage of the total time man-hours worked constitutes more than 40 hours a week!

Mr. Taylor: I have that in one of the other 393 studies.

The Court: All right.

Mr. Taylor: Now, we have the Exhibit D, I think, which is entitled "Statistical analysis of work hours of longshoremen in the port of New York during the pre-war period indicated." You will see that the earliest entries relate to the year 1923 and the latest entries are for the year 1937. Here again the companies who furnished this information are indicated by symbols.

. The Court: Are they the same ones?

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Frank W. Nolan-For Defendants-Direct.

Mr. Taylor: They are not the same ones, and neither Huron nor Bay Ridge are included in this list.

Q. Now, Mr. Nolan, the fact of the matter is, is it not."
that the first study covering the ten months period in
1938 and 1939 was made up first covering the 17 com-

panies! A. That's right.

Q. After that had been completed or possibly while it was in process, War Shipping came back to you and asked you or the New York Shipping Association, perhaps, whether it would be possible to make a similar study for a longer pre-war period, and also a period which would be before the Fair Labor Standards Act!

A. Yes.

Q. And that resulted in the chart which you now hold in front of you which is Defendants' Exhibit D, running from 1923 to 1937! A. Yes.

Q. In that instance you found a considerable difficulty, did you not, in finding companies who had preserved their records that far back! A. That is quite right.

Q. Which accounts for the fact that in 1923, for example, you have only one company. That is true until 1931. In 1931 you get two companies. That is also true in 1932. In 1933 you get three companies. In 1934 you get six, and so on down, so that the most recent year of the study is 1937, when you have 11 companies?

Mr. Taylor: And the columns, if your Honor please, the headings and the relationships are the same in this study as they are in the other. I won't take the time at this late hour to comment on them, but I would like to offer two exhibits which have not yet been offered, which are in the nature of graphical presentations of the information on that chart, that is, relating to the ten months study from

1938 to 1939 and the change in conditions between then and the war years with respect to which we will introduce a similar statistical study tomorrow through Dr. Reed.

Mr. Goldwater: Are they being offered in evi-

Mr. Taylor: Yes.

Mr. Goldwater: They are definitely objected to. I do not think any proper foundation has been laid. I think that the witness who prepared themshould be produced so that we may examine him concerning them.

Mr. Taylor: I will not quarrel about that at this time.

Mr. Goldwater: We are handed these at the very last moment without any opportunity to examine them.

The Court: You do not have to apologize. The objection is overruled at this time.

Mr. Taylor: May I have them marked for identification, please?

The Court: You may have them marked for identification.

(Marked Defendants' Exhibits G and H for identification.)

Q. I call your attention, Mr. Nolan, to another chart which has been marked Defendants' Exhibit F, which is entitled, "Relationship of contractual overtime to Wage and Hour overtime of longshoremen in the port of New York for payroll period nearest November 1, 1938, to payroll period nearest August 31, 1939."

Is it true that the 17 companies indicated by the 17 code letters in the lefthand column are the same com-

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panies covered in this other statistical study for the same period! A. As far as I know that is true.

> Mr. Taylor: Calling your Honor's attention to that, you will observe that of the total number of men employed only 8.01 per cent worked more than 40 hours in any work week. That is column No. 7.

> It also appears that 81/2 times—I am now referring to column 5-81/2 times as much contractnal overtime was paid to these men as would have been required under F. L. S. A.

> The Court: In terms of hours and not in terms of dollarst

> Mr. Taylor: Yes, this whole chart is in ferms of hours. I will make further comments on that, but I wanted to get those particular figures into the

record now.

Q. Mr. Nolan, the conditions with respect to overtime during the war were, to your knowledge, different from what they were in peacetime, isn't that true! A. As to volume of overtime work, yes.

Q. Why was that sof A. Well, it was simply and basically the necessity of dispatching the ships, working so far as possible around the clock every available hour. The ships had to meet convoy requirements. We were out to win a war, and every minute counted. It was not commercial operation by any means.

Q. The change in the amount of overtime, I take it. did not indicate any change based on a change in the industry; it was purely a war-induced situation! A.

That's correct.

Q. Are we far enough beyond V-J Day or V-E Day so that you can'tell us whether or not the industries have now reverted to the peacetime practices established by these statistical studies!

Mr. Goldwater: Objected to as immaterial. The Court: I was allow it.

A. It is gravitating in that direction gradually. There are still some governmental operations enduring, but where you get down to commercial operations, we will be getting back, and have in some cases already returned, to the status quo of this exhibit.

The Court: We will suspend at this time to 10:30 tomorrow morning.

(Adjourned to June 21, 1946, at 10:30 a, m.)

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New York, June 21, 1946; 10:30 o'clock a. m.

Trial resumed.

Mr. Goldwater: I wonder if Mr. Taylor will make the correction he was to make yesterday for the record with respect to the relationship between the so-called straight time and overtime in earlier years, which he said was always exactly 150 per cent. Subsequently he found he was in error.

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Mr. Taylor: Yes, it appears in the contract period October 1, 1931, to September 30, 1932, and again in the contract period November 4, \$\mathbb{\textbf{3}}\)3, to September 30, 1944, the general cargo straight time rate for longshoremen was 85 cents an hour and the overtime rate was \$1.20 an hour, 2½ cents less. In that connection I would like to hand to your Honor, if there is no serious objection, a sheet of paper on which this group of rate collective bargaining agreements, which make up one of the exhibits in the case, has been more or less tabulated and summar-

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ized. Mr. Goldwater has had a copy of it for a long time. I do not offer it as an exhibit but for the convenience of the Court.

Mr. Goldwater: I hope that the error does not appear on this sheet, and I hope that Mr. Taylor is again as correct as he would like to be and is not in his recent statement to your Honor. The last statement was that the difference was 2½ cents. My calculations are that time and a half times 85 cents is \$1.27½ and not \$1.22½, so the error is 7½ cents and not 2½ cents.

Mr. Taylor: All right, my heart is in the right

place.

Mr. Goldwater: Yes, I have said that.

Mr. O'Grady: How about 19321

Mr. Taylor: 1932. The contract for the years 1931 to 1933, the rates were 75 cents and \$1.10, which seem to me—all right, I won't make any comment.

Mr. Goldwater: There is where you have the 21/2 cents difference.

Mr. O'Grady: How about 1934-35!

Mr. Taylor: That seems to be 95 and \$1.35.

The Court: I will take the schedule.

Mr. Goldwater: There again it is 71/2 cents.

Mr. Taylor: O.K.

The Court: I will take this schedule as brief material and, of course, you can criticize it in your own brief material.

Mr. Goldwater: I am afraid we will have to check Mr. Taylor's patently bad arithmetic.

The Court: You may check it.

Mr. Goldwater: May I ask also in order to complete the record of yesterday, Mr. Taylor, whether you have a report from Mr. Iglehart on the statement he was to check and correct if necessary!

Frank W. Nolan For Defendants Direct.

Mr. Taylor: I have not heard a word from him.
Mr. Goldwater: Would you like to make the
correction yourself from your knowledge of the
facts?

Mr. Taylor; I wonder if you think it ember-

Mr. Goldwater: I am not trying to have you make corrections. I am trying to get the record correct, where the witness is obviously in error.

Mr. Taylor: You know the answer then.

Mr. Goldwater: I know the answer, but I cannot testify; but you can concede where a witness is in error.

Mr. Taylor: I have consulted the company and I have not yet heard from them. The moment I do I will let everybody know.

Mr. Goldwater: I am perfectly willing to let it rest at that and call attention to it at each hearing.

FRANK W. NOLAN resumed the stand.

Birect Examination (continued) by Mr. Taylor:

Q. I think there is only one more question I would like to ask you. Can you tell us approximately, roughly, how many more ships cleared out of the port of New York during the wartime years than during the peacetime period preceding the war!

Mr. Goldwater: I object to that on the ground that that is immaterial and irrelevant,

The Court: I will allow him to answer.

A. My answer is four to five times the number during the war period than existed pre-war.

Frank W. Nolan-For Defendants-Direct.

The Court: Will you elaborate on that a little, how you calculate it as four to five times?

The Witness: Well, your Honor, it will become a matter of statistical record to show. I am drawing from my generalized knowledge to that effect.

The Court: Just what do you call a ship?

The Witness: Ships,

The Court: Oh, ships, all right.

The Witness: And I would further emphasize that when I speak of ships during the war, we are referring to large cargoes in those ships. A Liberty ship will take 8,000 to 8,500 tons of cargo, whereas the cargo pre-war by and large I would imagine did not exceed 4,000 tons, perhaps less, of cargo handled by longshoremen.

Q. Isn't it also true that during the war years the vessels coming in and out of the port were more predominantly cargo vessels rather than passenger vessels? A. That is correct.

Q. During the war period what was the situation with respect to the facilities available for handling cargo in and out of vessels? A. You mean the pier facilities, I

414 assume.

Q. Yes. A. We had actually less pier facilities to work with for cargo operations during the war than we had pre-war because certain pier facilities were taken over by the Army, the Navy, the Coast Guard and devoted exclusively to military purposes and not cargo.

Q. Did the circumstances under which you have just referred have some bearing on the amount of overtime that was worked during the war period as compared with the amount of overtime that is normally worked in peace-

time?

Mr. Goldwater: I object to that as calling for a conclusion.

The Court: I will allow it.

A. I would say yes.

Cross Examination by Mr. Goldwater:

Q. Mr. Nolan, on what did you base your statement that there was four or five times more ships during the war period than during peacetime in and out of the port of New York? A. My own familiarity with the movement of ships.

Q. Have you any records, have you had resort to any records prior to coming to court today! A. A matter of published record, not more than six or eight months ago, as to the extent of the volume of tonnage and dry cargo ships moving in and out of the port of New York.

Q. Will you tell us where the published record was, where you found it and where we can find it? A. That is

my recollection. "

Q. Where was the published record? What published record are you referring to? A. Newspaper record.

Q. What newspaper? A. That is a difficult thing to put my finger on at the moment.

Q. Lam asking you the source of the information. A. 417

My own knowledge.

- Q. You said a moment ago your knowledge was based upon a statement you saw in the newspaper, is that a fact? A. No, it is my own knowledge, plus the statement in the newspaper, confirmed by the War Shipping Administration.
- Q. Will you take the month of February 1944 and tell us what the tonnage was that passed in and out of the port of New York in that month. A. A great deal.

Q. Can you tell me how much? A. I cannot.

Q. Can you tell me how much it was in the month of March 1939! A. Quite obviously I have not the number of ships at my fingertips.

Q. And you have not the amount of tonnage either? A. No. I have not the tonnage.

Q. So that your statement is a pure generalized statement? A. Generalized, backed by familiarity with what

is going on.

Q. But you have no recollection now of the figures? It is just general impression that you are relying on, isn't it! A. It is a matter that everyone in the port of New York knew.

Q. I am asking about what you knew, not what everyone in the port of New York knows. Suppose you confine your answers to your knowledge. I want to know what you base the statement on. So far as you told me it was in newspapers you saw, and now you tell me it is your general familiarity. Is there anything more specific than that! A. Yes, I think this will possibly convince you, if you need convincing. Every pier in the port of New York was occupied with ships during the war period, which was distinctly different than that which obtained pre-war. Piers which were practically idle for months, in some cases years, pre-war, were occupied by harbor ships working during the war period.

Q. Will you tell us which piers were idle for months or years prior to the war? I would like to know. A. The

East River piers, several of them for a starter.

Q. Give us the numbers, will you! A. Pre-war very little activity at Piers 6 and 8 East River, Pier 19 East River, Pier 27 and Pier 28 East River, Pier 33 East River, and I can continue on with some other piers in the port, if you would like to know that.

Q. Yes, I would like to know. A. Piers on Staten Island were nearly idle pre-war, Piers 9 and 10. I think

we could take some others.

Q. You said for how long a period of time, do you mean for months or for years those piers were nearly idle? A. In some cases months, in some cases years, there was no activity in there.

Q. You cannot tell us which months or which years, can yout A. I could not give you the specific months of the year. I knew that the East River with few exceptions was an idle area pre-war, with the exception of about 5 or 6 piers. The rest was open.

Q. Your estimate of four or five times as much tonnage passing through the port is based upon this general information that you have, is that right? A. That is right.

> The Court: Did you do four or five times as much business during the war as you did before the war!

> The Witness: No, T do not think we did, your Honor.

The Court: What would be your ratio?

The Witness: My estimate would be 21/2 times,

The Court: Tonnagewise?

The Witness: Cargo tonnage, yes.

Q. You have said in answer to Mr. Taylor's questions that there was a difference in the conditions of employment in the industry. I am talking about, of course, the longshoremen. You have said that there was a difference in the conditions of employment in the industry prior to 423 the war and during the war, is that right? A. Difference in employment? Will you elaborate on it?

Q. I mean in the volume of employment, in the hours worked, in the number of teams. A. A great increase in

the overtime hours you mean?

Q. Yes. A. Overtime and straight time?

Q. Yes. A. That is right.

Q. Bid the peacetime conditions as to the method and practice of employment, apart from any change in the sense of rates, continue almost the same, substantially the same, from 1925, let us say, up to the time of the warf A. That is a question I cannot understand.

Q. Perhaps it is not clear, but I will try to make it clearer, Mr. Nolan. I would like to know whether there was any substantial difference in the conditions of work of the men with respect to the manner in which they were employed and the manner in which they worked and the manner in which cargoes were handled by the stevedoring companies, between 1928 and the commencement of the war. A. The ships were still ships, and the cargo was still cargo, and the lighters were still lighters? What do you mean by the manner in which they worked?

Q. I mean did the stevedoring companies' operations with respect to its employment of their men and their management of the cargo handling change any between 1925 and the war! A. I cannot recall general changes, except in the agreement.

The Court: Call his attention to particular things you have in mind. Do you mean increased mechanization? Do you mean increased employment relationship?

Mr. Goldwater: I am talking about employment relationship. I thought I made that clear. I am talking about the employment relationship between the stevedoring companies and the men.

The Court: Were the men still employees of the stevedoring companies?

The Witness: Yes, sir.

The Court: They were not hired as agents for some other employer?

The Witness: No, sir.

Q. Were the men during that period from 1925 until the commencement of the war hired in the same manner, that is, by the shape-up manner? A. That is right.

Q. And were the conditions which have been described with respect to finishing a job with a group of men at a hatch, carrying them into overtime if necessary, were those conditions the same? A. Approximately.

Q. During that period? I am talking about approxi-

mately. A. Yes.

Q. There was no substantial difference in that, that is, you carried men over who worked in the daytime in the night, where you were finishing up, is that right? A. Yes.

The Court: Except that it happened more often, according to your previous testimony! The Witness: Yes, sir.

Q. Apart from the fact that it happened more often during the war, was there any substantial change in any of these conditions between 1925 and 1940? A. A. great deal more night work during the war.

Q. Yes, but I am talking about the period prior to

the war. A. No.

Q. Was there substantially the same amount of night ework between 1925 and 1939? A. With the exception of the ups and downs, the dips of the steamship business, I would say generally the same.

Q. That is what I mean. I am not talking about trivial differences, the conditions which may have been slightly affected from month to month by the fact that you had more cargo than another time, nor am I talking about any differences that there might have been between a rate of 85 or 90 cents straight time or \$1.20 to \$1.25 overtime. I am not talking about such differences. A. An improvement in terms and conditions of the agreement?

Q. Yes, there may have been changes in the conditions of the agreement? A. That is right.

Q. Let me ask you this, how long were you connected with the New York Shipping Conference, did you say?

A. Eight years, 1937-1938.

Q. Did you participate in the negotiations for the union contracts from 1937 of 1938, whichever it was, up to the time of this last contract? A. That is correct.

Q. You participated in all of those? A. Yes.

Q. I would like to take a question which his Honorasked yesterday and follow through on it. I understood—I am not clear whether this question was directed to you or another witness. If it was not I direct the question to you now. Assume a man worked 8 hours on a night shift during a night period for five days, which would be 40 hours. As I understand the arrangement in the port the men get \$1.87½ an hour for each hour during 1943, 1944 and 1945? A. That is right.

Q. Is that fight! A. Yes.

- Q. If that man worked on Saturday morning, how much do you say he was paid customarily in this port!

 A. His regular rate of pay, normal rate of pay, \$1.25.
- Q. Now, will you assume, as I think we shall show by the record it did occur, that a man worked 10 hours a night for 5 days, making 50 hours, how much was he paid for each of those hours! A. According to the agreement \$1.87%. He was already being paid the overtime rate.

Q. And he got no different pay for the last 10 hours than he did for the first?. A. He worked no other overtime.

- Q. All right, and on Saturday morning if he worked again, the same man, he would still get \$1.25? A. That is right.
- Q. Am I to assume your answer would be the same if man worked 10, 12 or 14 hours during the night and then worked Saturday morning following? A. That is correct.

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Mr. Taylor: Mr. Goldwater, for the purpose of making sure the record is not confused, you will allow this addition to it, will you not, that in all these questions that you have just been asking Mr. Nolan, you have assumed that no straight time was worked during that same week.

The Court: That is right. It assumes only

the terms of employment in the question.

Mr. Goldwater: Assumption that he worked five nights at 10 hours.

Mr. Taylor: That is correct.

Mr. Goldwater: I would have given him any other hours a man worked if that was implicit in the question.

Mr. Taylor: O. K. You are not assuming that he had worked any 40 straight time hours during the same week, but only the nighttime hours to which you referred, is that right?

The Court: That is right. The question is

plain.

Mr. Goldwater: There isn't any question about the intent of the question.

Q. If a man worked 8 hours on Monday between the hours of 8 and 5, and worked four days, four nights, rather, 10 hours a night, and Saturday morning, would you tell me what rates of pay the man would receive for each of those hours worked?

The Court: Do you want a piece of paper to figure it out?

The Witness: No, I can give the answer. It is not too complicated. The 8 hours of Monday between 8 a. m. and 5 p. m. would be at the normal rate of pay.

The Court: \$1.251

The Witness: Correct, sir.. And Safurday morning the same. And for the hours worked at night would be the overtime rate of \$1.875. It seems immaterial whether he has worked the overtime before or the overtime after, he is getting his overtime.

Q. That may seem immaterial to you, Mr. Nolan; it may not be so to us. A. Thank you, sir.

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The Court: In any event, that was the practice in the industry?

The Witness: Yes.

Mr. Goldwater: That is all I wanted to establish.

Q. Now may I ask you finally, Mr. Nolan, if a man worked 20 hours during the night period, that is after 5 p. m. at night, on two or three or four nights during the work week beginning Monday and ending the following Sunday night, he would receive for each of those hours, as I understand you, \$1.875? A. Had he worked no other hours?

Q. No. A, Just the 20 hours?

Q. Just the 20 hours after 5 p. m. at night. A. No other work during the week.

Q. No other work during the week? A. \$1.875.

Q. All right.

The Court: Do you ever pay a man at a rate of \$1.25 for more than 40 hours' work?

The Witness: No, sir.

Mr. Goldwater: May I have that question?

Q. (Read.)

The Court: Do you follow my question?

Mr. Goldwater: No. I don't think that is consistent with the witness's answers previously, that is why I am confused.

The Court: The question was do you eyer pay a man the \$1.25 rate for a number of hours in excess of 40 hours! In other words, is the man's pay ever less than 40 times—at any rate I think the question is clear, but let's restate it.

Mr. Goldwater: Well, let's see. I would like to follow that up.

The Witness: May I say, your Honor, you intended you never pay 44 hours at \$1.25.

The Court: Do you ever pay a man 41 hours at \$1.25, or 42 hours at \$1.251

The Witness: Pay them 40 hours for day work at \$1.25, and any excess beyond 40 straight time hours he receives \$1.875.

The Court: All right. That is the question I wanted to get.

By Mr. Goldwater:

Q. Now let's see: When the man worked 5 nights 8 hours a night, he had worked 40 hours, Mr. Nolan, had he not? 441 A. At \$1.875.

Q. That is right. A. Overtime rate.

Q. And on Saturday morning he worked 4 hours, which, would be the 41st, 42nd, 43rd and 44th hours of work in that week, is that right? A. To me it is his first, second, third and fourth normal time hour,

y. No; would it be the 41st, 42nd, 43rd and 44th hours that is worked by the man in that week?

The Court: We are getting into semantics. You want to know what would you pay for those 4 hours, and you may ask that question.

Mr. Taylor: He has already asked it.

The Court: Yes, I thought he had, but he can answer it again. You pay \$1.25 for those hours?

The Witness: Correct, sir.

Mr. Goldwater: I am asking this witness if those 4 hours are not the 41st, 42nd, 43rd and 44th hours work?

The Court: I will settle that issue.

Mr. Goldwater: I think it is a very important question, your Honor, and the witness can answer it.

The Court: I know, but I won't be guided by his

answer on that question.

Mr. Goldwater: Maybe your Honor will not be, but a superior court may be, and it seems to me that is a factual question and the witness should be required to answer it.

Mr. Taylor: We don't need to waste time on that sort of thing. We all can count and know 41 is be-

yond 40.

The Court: Sustained. I don't mean to foreclose my answer to the question, but I think that is a question which goes to the issues of this case.

Mr. Goldwater: I understand that, but your Honor's answer to the question can be only one

thing.

The Court: That may well be, but it is going to be the Court's answer, not the witness's answer.

Mr. Goldwater: I think still, your Honor, that

that is a matter of fact.

The Court: Well, I have taken note of the fact. It is already in Tidence that the work week began Monday morning and ended on Monday at 8 a. m. or 7:59 and 59 beconds a. m. I am aware of all that. And if rotational time is the standard, then it is the 41st, 42nd, 43rd and 44th hour; if it is not rotational time which is crucial, then it doesn't make

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any difference. I don't know the answer to those questions, but the answers will have to be a judicial and not a witness's answer.

Mr. Goldwater: Your Honor said it is was not necessary to take an exception to rulings.

The Court: You are quite right.

By Mr. Goldwater:

Q. Mr. Nolan, in your general experience in this industry for a number of years, as you have described it, have you become cognizant in a general way of the accident rate in the business? A. In general.

Q. What would you say about the ratio of accident at night to accident at day? A. You know, counsellor, we have had a strange idea that accidents would be very frequent at night. The statistics do not support it.

The Court: In other words, your answer is that the accident rate is not higher at night than by day! That is what you want to answer!

Mr. Goldwater: I am not surprised at the answer, your Honor, and I would like the witness now to square it with his testimony that there is greater fatigue when a man works at night.

The Witness: Greater fatigue!

Q. Yes; haven't you so testified, Mr. Nolan?

Mr. Taylor: I object.

- A. No, I have not so testified.
- Q. Oh, you have not? A. No.

The Court: The objection is overruled. Now put your next question, and let him answer the question you put.

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Q. Do you say you have not testified that the man working at night suffered greater fatigue than the man working in the day? A. I said after a normal 8-hour day if they run into overtime you are getting into a fatigue period. The Judge asked me how about that case of a man starting at 7 o'clock at night.

Q. Yes, and what did you say as to that? A. I said the same ratio of elapsed period of 7 or 8 hours, if that continued on beyond it they should have the same

Q. And you would say that the man could work as efficiently beginning at 7 o'clock in the evening as the man who started at 8 o'clock in the morning? A. We contend that we do not think any overtime is efficient.

The Court: How about night work not overtime, in other words the man who works regularly at night.

Mr. Goldwater: I said men starting at 7 o'clock

at night.

The Court: Is that as efficient as men working the day shift?

The Witness: No, sir.

The Court: It is not as efficient.

The Witness: No.

The Court: For reasons of fatigue or for other reasons!

The Witness: It is a matter of preference as to whether they work day or night, and certain men elect to work at night.

The Court: No, you are not answering my question. Do longshoremen as a species of human beings suffer greater bodily deterioration at night, or are they as physically productive at night, assuming they slept during the day, as when they work by day and had slept during the night?

The Witness: We always get better work during the day.

The Court: You get better work during the day.

And you don't know for what reason?

The Witness: Well, we know the operation can be policed better, supervised better, and there are numerous factors entering into it.

The Court: You are not attributing the difference to physiological differences?

The Witness: In generalities I would not, your.

The Court: At least you don't know!

The Witness: No.

The Court: You are not a physician? The Witness: No.

Q. One of the defendant's witnesses has said that in spite of improvements in lighting that the lighting was not as good at night and that that affected the efficiency of the work. A. It is not as good as daylight, we can all see that.

Q. Do you think that affects the efficiency of the work?

Q. You do! A. I would think it would.

Q. Would the lighting not being as good as day contribute the possibility of greater accident at night than in the daytime? A. One would think so, but the records apparently do not support it.

Q. It doesn't seem so. You do subscribe, however, to the position that the men prefer day work to night

work? A. Yes, sir.

Q. What records do you have reference to when you said that the records do not support the fact that one would have expected, that there was a greater accident ratio at night than in the daytime? A. Well, a general

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examination of when accidents happen. We know when they happen currently.

Q. I mean were you referring to any specific records

of accidents? A. No.

Q. In any particular year made by any particular agency? A. No. sir.

> The Court: So possibly you are in error and have formed your opinion simply on the basis of the fact that more cargo is moved by day than by night, or had you admeasured the incidence of injury in relationship to the volume of cargo moved?

The Witness: No. I don't think that we boiled it down, your Honor, to the incidence against the number of man-hours, it is just the number of accidents you have at night as compared to those during the day. .

The Court: Well, you would expect a smaller number because the volume of activity is smaller?

The Witness: Yes, sir.

The Court: So you really don't know whether the accident rate is higher, scientifically calculated?

The Witness: Correct.

The Court: I imagine there ought to be Gevernment statistics on these things.

Mr. Goldwater: Yes. I wondered whether the witness had had recourse to them. That is why I asked.

The Court: Or the insurance companies may have statistics.

Mr. Goldwater: I am sure we can find them.

Q. Mr. Nolan, are you familiar with the instruction sheet of which the defendants' counsel has furnished us

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a copy, which was dated February 24, 1945, in connection with the preparation of Defendants' Exhibit D in evidence? I will show you the copy to which I am referring, the photostatic copy which was furnished me by Mr. Taylor. A. Yes, I am familiar with that.

Q. That has reference to one of the exhibits which Mr.

Taylor showed you yesterday? A. Yes.

Q. You are familiar with that? A. Yes. I can't remember all the details.

Q. Oh no, I don't expect you to: I just wanted to know if you had familiarity with it. This particular copy which I have happens to be addressed to Mr. Sellers, vicé-president of your corporation? A. Correct.

Q. And I assume that one similar to this was sent to each of the companies which are designated by letters on

the exhibit?

Mr. Taylor: May I see what you have, please. Mr. Goldwater: Yes (handing). Mr. Taylor: Thank you.

Q. Did you answer that question, or do you know? A. I said I had general familiarity with it.

Q. Well, I asked you whether you know whether a letter similar to this, the same instructions, was sent to each of the companies which are designated by a letter on the exhibit that was shown you yesterday, Exhibit D? A. I

don't know. I can't so state.

Q. Had you anything to do with, the selection of the language or the material that was called for—the language in this letter or the material that was called for in this letter of instructions?

> Mr. Taylor: I object to the question because of its form. You have two questions in one there.

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Frank W. Nolan-For Defendants-Cross.

Mr. Goldwater: Well, I will separate them. The Court: Spread them out. Mr. Goldwater: Oh, of course.

Q. Had you anything to do with the selection of the language which was employed in this letter of instructions? A. No.

Q. Now, had you anything to do with the designation of the material called for in this letter of instructions?

A. No.

Q. Do you know who did decide what material would be called for from the companies which is now collated in this Exhibit 4? In other words, who prepared this letter? A. I don't know.

Q. You don't know? A. No. I don't recall. I don't see the letter. May I see the letter?

Q. Of course (handing). A. I should say you should ask the man who signed the letter, counsellor.

Q. Well, let's see, Mr. Nolan.

By the Court:

Q. Did you have anything to do with it? A. I knew of the query to be sent out, your Honor.

Q. Did you have anything to do with the preparation of this investigation? A. No, sir.

The Court: All right,

By Mr. Goldwater:

Q. Do you mean to say, Mr. Nolan, that you had no conferences with Mr. Taylor, Mrs. Schleifer or anyone else representing the War Shipping Board prior to sending out this letter, with respect to the material that was to be asked for in it? A. I personally did not.

Q. You had no such conferences? A. No.

Mr. Goldwater: That is all, sir.

Re-direct Examination by Mr. Taylor:

Q. Mr. Nolan, you still stand by your answer yesterday, do you not, that you talked with Mrs. Schleifer and Professor Smith and other people with respect to the selection of the 17 companies? A. Correct, sir.

Q. And when you answered Mr. Goldwater as you did just now, is that because you thought he was asking you

whether you had anything to do with the details-

Mr. Goldwater: Here I ask that Mr. Taylor again from now on refrain from testifying. Ask questions.

Mr. Taylor: All right. I think it is sufficiently covered.

The Court: It is clear enough. You are excused. Is there anything further of Mr. Nolan.

Mr. Goldwater: I would like to ask the witness something.

Re-cross Examination by Mr. Goldwater:

Q. You did have something to do with the selection of the 17 companies to whom this letter where their names 465 appear was addressed? A. I did.

Q. Did you suggest the names of the companies? A

Q. For what purpose did you select the names? A. Because Mr. Lyon of the New York Shipping Association and Mrs. Schleifer had indicated the summary of the details that were to be prepared.

Q. And in advance of the selection of the names you were told the material that was going to be asked for, weren't you? A. Just as to a summary of the dates, to find out which companies represented a certain volume of business in the port.

Q. Well, could you be more explicit as to that? I don't quite understand it. A. Well, I testified yesterday that the 17 companies represented 70 per cent of the volume of business in the port.

Q. Yes. A. And I was asked to indicate the companies that could make up a substantial segment of the port's

activities.

Q. I see; and that is the only question that you were asked concerning this. A. Well, you referred to me having something to do with the preparation of this letter—

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The Court: Forget about that now. You were asked for the names of substantial participants in the stevedoring business in this port?

The Witness: That is right.

The Court: Over a period of time.

The Witness: That is right, in certain brackets. The Court: Certain brackets, meaning what

kind of brackets!

The Witness: Per year.

The Court: Oh, time brackets?

The Witness: Yes, but that was because some had been busy in the pre-war and others were

not busy.

Mr. Goldwater: Well now, the purpose of my inquiry, Mr. Nolan, I thought was clear. Now I would like to know whether it was indicated to you, when you were asked for the names of the companies, what information the companies were going to be asked for.

The Witness: Well, most emphatically I knew what they were going to be asked for.

Q. Oh. Well now, what were you told they were going to be asked for? A. That they were going to be re-

quired to submit data of employment during straight time and overtime during certain periods pre-war and possibly during the war.

Q. Were you told as to the form in which they would be asked to supply it-I mean as to breakdown? A.

In generalities.

- Q. Were you told that they would be asked to supply what number of so-called overtime man-hours also involved man-hours worked during each of the following straight time periods: A, from 8 to 6 straight time hours; B, from less than 6 to 4 straight time hours; C, from less than 4 to 2 straight time hours; D, from less than 2 to no straight time hours; and E, no straight time hours. A. Well, you are reciting there. I assume that was discussed.
- Q. Well, I am asking you whether you recall now whether you were told at the time that each of the companies whose names you gave to Mr. Taylor or Mrs. Schleifer were going to be asked to break down the information into those several groups? A. At the time that was being discussed, counsellor, we were asked to get together the information of these companies, X number, representing a substantial segment of the port's activities.

Q. Yes! A. And they would be required by the New York Shipping Association to present data of a certain technical nature, and all of that was reviewed, in so far as those companies are concerned, and some could not give it and others could give it, and those companies were segregated as to volume to create and submit a factual record which was ultimately compiled.

Q. I ask you, Mr. Nolan, whether you recall whether, when you discussed the matter with Mrs. Schleifer and whomever else you discussed it with, you were told that

the information to be supplied would be asked for in the breakdown as I have given it to you in hours? A. I say so in generalities. That is my recollection.

Q. Now then I will ask you, didn't you understand my question ten minutes ago when I asked whether you were consulted with respect to the material that was going to be asked for! A. As I interpreted your question, did I have to do with the preparation of that letter!

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The Court: Or the material that went into it.

The Witness: So I said you better ask the
man who signed the letter.

The Court: The intimation being that you did not prepare the material?

The Witness: I did not prepare the letter.

The Court: Or suggest the material?

The Witness: No, sir; I simply discussed with the people who were seeking the material.

Q. You say now that you did in advance of the sending out of this letter, when you supplied—at the time that the names were supplied, discuss the material which was to be asked for? A. That is correct.

- Q. Now do you recall now distinctly enough to say whether you were told why the companies would be asked for the number of overtime man-hours which also involved man-hours worked during the period from 8 to 6 straight time hours? A. Yes.
- Q. Do you know why they were asked for that particular breakdown? Was that said at that time? A. I have a recollection, but not quite clearly, of why they wanted the 6 hours, 4 hours and 2 hours.
- Q. Was there any discussion about whether or not you should ask for the number of overtime man-hours worked by men who also worked 8 hours, specifically 8

hours rather than 8 to 6 hours straight time? A. I can't recall.

Q. You don't recall? A. I can't recall why. 'It may have been clear then, but I don't recall it now.

Q. And you don't know why there was segregated out the group who worked 8 straight—8 straight time hours, not less than 8, but just 8 straight time hours and overtime after that! A. I cannot remember.

Q. And you do not recall specifically now any conversation concerning whether that information should be asked for as segregated from information with respect to the 8 to 6 group? A. I can't just now.

Q. I assume what you mean is that you have no recollection of what if anything was said on that line, is that what you mean? A. I can't recall the reason

for asking that, counsellor.

Q. Well, can you recall now anything that was said on that subject at that conference or more than one conference, if more than one took place! A. As I recall, it was simply seeking to find how many men had continued on from a straight time period into overtime, and you are bringing it down to the point whether they worked exactly 8 hours and continued on into overtime and worked four or six hours and then overtime.

Q. That is correct; I want to know whether you can recall anything that was said at any—at a conference or any conferences concerning this material, with respect to the group of men, a segregated-out group, who worked exactly 8 hours straight time and overtime after

that? A. I can't recall.

Q. You can't recall any conversation concerning that?
A. At that particular time, no.

Mr. Goldwater: That is all, Mr. Nolan. (Witness excused.)

James B. Young-For Defendants-Direct.

The Court: I haven't had a chance to go over the exhibits yet in detail. Do the exhibits show the precise working schedule of the plaintiffs in this case—I mean which hours they worked and which days and so on?

Mr. Goldwater: Yes, they show it to a limited extent; they show it to the extent that Mr. Taylor could supply it. That is, they show weeks and they show a long period of time with respect to some

of the plaintiffs.

The Court: They show when they worked day-

Mr. Goldwater: And then show whether they worked daytime or nighttime by a code letter.

JAMES B. Young, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

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The Court: I may suggest that a good deal of material has now been covered. Cumulation is hardly necessary.

Mr. Taylor: I will be very brief, your Honor.

Q. Where do you live, Mr. Young? A. Little Falls, New Jersey.

Q. What is your business? A. I am in the steamship business.

Q. What company or companies? A. Barber Steamship Lines, Inc., American-West African Line, Inc.

Q. The only question I want to ask you is, if you are able to answer it, if you have enough familiarity of the

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481 character to answer it, as to the ratios of straight time and overtime in this port as between operations involving passenger ships on the one hand and operations

involving cargo ships on the other hand? Mr. Goldwater: I object to that as entirely

immaterial to the issues here. The Court: I will accept it. That has been gone into a number of times. I will let him an-

Q. Do you understand what I want to know? don't quite follow your question, Mr. Taylor.

Q. Is there any difference in the amount of overtime worked handling cargo ships and the amount of overtime that is worked on passenger ships?

> Mr. Goldwater: Objection on the ground stated. The Court. Overruled.

A. I should say so, very definitely.

Q. Can you give us an idea how much the difference to, and will you please tell us why. A. Well, my answer would be that with general cango, say, the importance of 483 working overtime is not nearly so great as it would be in the case of passenger ships. While we have not handled many passenger ships, I do have a general knowledge of the activities at piers where the passenger ships are berthed.

The Court: In other words, your answer is that there is more overtime worked in normal times on passenger than there is on cargo ships?

The Witness: Yes.

Q. Your lines are mainly cargo carrying lines? A. Yes, with a very limited number of passengers, 14 at the most per ship.

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Q. Is there a stevedoring company known as the Atlantic Stevedoring Company? A. Yes.

Q. Associated in some way with the Barber Steamship Lines? A. That is an associated company of the Barber Steamship Lines.

Q. They do the stevedoring for the Barber Lines! A.

At our terminal, yes.

Q. Do you know if they do contract stevedoring also, or do they work exclusively for Barber! A. Exclusively for Barber Steamship Lines and American-West African Line.

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of the record, that on the statistical charts relating to the studies of the experience of the 17 companies the code reference for Atlantic is "CA". That is all for this witness.

Cross Examination by Mr. Goldwater:

Q. Mr. Young, would the answers which you gave to Mr. Taylor with respect to passenger ships and cargo ships generally, and the incidence of overtime, pertain throughout the period, let us say, from 1925 to 1940? A. Yes.

- Q. There would be no substantial variation during that period in the incidence of overtime with respect to passenger and cargo ships? A. You mean on the general relativity?
 - Q. That is right? A. I would not say so.
- Q. You would not want to distinguish any one or two or three years in the period 1925 to 1940 where conditions for some reason would make a difference? We know that it is substantially different now, of course. A. Well, there were economic considerations, of course.
- Q. Yes, there was that, and perhaps the vessels were a little more full in one year and less in another year;

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those things occur. A. To make myself clear and state what I mean is that the emphasis on overtime on cargo ships is nothing as compared with the emphasis on passenger ships.

Q. I understand; and that emphasis, or the degree of emphasis was approximately the same between 1925 and 1940, throughout those years? A. I should say it is a general emphasis, without regard to any particular period.

Q. Yes. All right. Now as between the period up to 1940, or 1939, we will say, prior to the war, and the period after the commencement of the war, what would you say of the relationship? A. Well, the period after the commencement of the war was, needless to say, one of abnormality and one over which the individual steamship company as such had little or no control. As has already been testified, we were involved in a very serious war, which dictated the necessity of working ships beyond what would have been the case had normality prevailed.

Q. And would you say that the only substantial change then, after 1939, was in the amount of overtime—there was more overtime, as witnesses have said! A. Oh, definitely.

Q. When you talk of the pressure of night time working, overtime, not being as great on passenger ships as cargo ships—

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Mr. Taylor: He did not say that.

A. I think that is the reverse.

Q. I am sorry. When you talk of the pressure of night work, overtime work, not being as great on cargo ships as on passenger ships, you refer to general information, not your own experience, do you not? A. No, I refer to my own experience, certainly as to cargo ships, and my general knowledge as to passenger ships.

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Q. And your general knowledge as to passenger ships?

Q. Is that what you said! A. Yes.

Q. That is, you have no so-called real passenger ships in your lines? A. We do not operate a passenger line, if that is what you mean.

Q. Yes; you have these boats of 14 passengers to a ship, as a mere incident to your cargo carrying; isn't that

it? A. Definitely; that is right.

Q. In your experience is it advisable, not to say essential at times, for a cargo-carrying line to commit itself as to deliveries of cargo, dates of sailing and so on? A. I would say that by and large that is more the exception than the rule; and if I may amplify what I have just stated—

Q. Of course. A. We in the general cargo business over long trade routes do not set up schedules saying that one month hence we are going to sail on Friday at 3:30. Our schedules of working a ship or our plan for working the ship is usually formulated after the vessel arrives safely back into port, and we can then forecast how we might best work the ship from the standpoint of cost and then we might advertise our anticipated sailing date.

Q. Your emphasis, of course, is on cost, as you have just indicated? A. Well, naturally; we are in business.

Q. And don't you begin to know what cargo you are going to have before the ship is safely back in port? A. Well, for a period of a couple of weeks before that. Not necessarily the volume, however.

Q. You don't mean to say that you don't have inquiries as to your ability to carry so many tons from a particular client or customer? A. Yes, but I am talking about the

aggregate for the ship.

Q. I know. I know that you won't know, of course, until some time later what the total aggregate will be, but you begin to know, as my question says, before the

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ships gets back into port what you are going to put on that ship? A. You mean the kind of cargo, or volume?

I mean the volume; you begin to know something about the volume, get it accumulated, don't you! A. We have vision, possibly, as to what we may be able to get on the ship.

Q. Isn't it a fact that you do not get your first inquiries. about your ability to carry a volume of cargo the minute the ship gets into port, and that it begins then and not a minute before? A. I don't quite follow what you mean.

> The Court: In other words, you do have a rotational business; certain customers that you know you deal with pretty regularly?

The Witness: Yes.

The Court: You anticipate their business, and when the ship comes in you have a pretty good idea that you will be able to send her back laden and not light?

The Witness: Well, laden to a certain extent, yes.

The Court: That is right. I think we will have to suspend, unless you are going to stop with another question.

Mr. Goldwater: I won't have many questions, but I would just as soon stop.

(Short recess.)

Mr. Taylor: I would like to state for the record that on the large statistical table which contains information with respect to the period from 1923 to 1937, Exhibit D, the Code symbol A-1 refers to the Atlantic Stevedoring, Inc., which, as I pointed out earlier, is "C-A" on the table relating to the ten months' studies.

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Mr. Goldwater: May I ask one other question, then, and perhaps, Mr. Taylor, I would like to ask you first is there someone in court representing the Atlantic Stevedoring Company?

Mr. Taylor: Only Mr. Young.

Mr. Goldwater: I thought perhaps you would produce somebody.

Mr. Taylor: No.

By Mr. Goldwater:

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Q. I would like to ask, Mr. Young—I just wanted to ask whether there was any connection between the companies besides the employment connection which you have described. In other words, is there a subsidiary or an affiliate of your line? A. It is a separate corporation, associted with the Barber Steamship Lines.

The Court: Under common ownership?
The Witness: Under closed ownership.

The Court: Is it owned by the same people who own the Barber?

The Witness: The stockholders are not all identical.

The Court: But they are the same family groups, and things of that kind?

The Witness: Yes, sir.

Q. Are you personally familiar, Mr. Young, with the operations of the Atlantic! A. Not entirely so, but in a general way.

Q. Are you familiar with its employment relations with

its employees? A. Yes.

Q. Are you an officer of Atlantic yourself? A. No.

"Q. What is the nature of your familiarity; what is the source of your knowledge? A. By association with the

companies of which I am an officer, and what the Atlantic Stevedoring Company does for them.

Q. Do you have anything to do personally with the operations of Atlantic? A. No, not with the operations, no.

Q. Then all that comes to you comes through the officers of the Atlantic?

The Court: Whatever information you have you get from the officers of Atlantic?

The Witness: Yes, sir.

(Witness excused.)

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JOSEPH B. RYAN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live! A. 433 West 21st Street, New York City.

Q. You are the president of the International Long-shoremen's Association, are you not? A. Yes.

Q. And you have been since 1927? A. Yes.

Q. Will you be good enough to tell the Court what your connection has been with the I. L. A. since its beginnings, that is, since the time you first had contact with it? A. I joined Local 791 International Longshoremen's Association around March, 1912. I do not want to burden the record, Judge, but I would like to say that for eight years previous I worked on the streetcars, from conductor to inspector, which was practically a 12-hour day, and that is why I got out of that business and joined Local 791 and worked as a longshoreman.

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In 1913 I was elected financial secretary at \$1 a meeting, to take care of office, and in 1916 I was continued in the office of financial secretary, but I got a steady office at \$30 a week, because the Local could afford a business agent and a secretary, and I was chosen, and the job I was in made a permanent position. I was made a delegate to the District Council of Local 791. The District Council is the governing body in each port. We have one District Council here, your Honor, covering all of the port of New York, New Jersey—what is known as the port of New York. I was delegate to the Council and was elected treasurer.

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Finally, in 1918, I became president of the Atlantic Coast District, which runs from Halifax, Nova Scotia, to Hampton Roads, and I held that office ever since, purposely, because the Atlantic Coast District negotiates the agreement on the Atlantic Coast, and that is why I have held that office until the present. So that in spite of the fact I am president of the International I am still president of the Atlantic Coast District, chairman of the Wage Scale Committee each year, and I was elected eighth vice-president of the I. L. A., the International organization, in 1919, and in 1921, when Mr. O'Connor went with the United States Shipping Board I moved up to first vice-president, and then was elected in 1927 as the president.

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Q. Is the I. L. A. the only union in the port of Greater Nw York covering the longshore industry? They contract for the longshoremen in the entire port of Greater New York? A. Yes.

Q. And the contracts, as they are negotiated year by year, or every other year, whenever the case may be, are negotiated between the I. L. A. and who else? A. From 1915, when we secured our first agreement, the shipping interests in the port of New York were known as the Transatlantic Steamship Conference Committee, and we

made yearly agreements with the Transatlantic Steamship Conference Committee until they were changed into the New York Shipping Association. I should judge about ten years ago we got into the practice of making two-yearly agreements, with the clause in each agreement that either side could reopen the wage scale question by serving notice on each other on September 1st. The agreement expired on September 30th. On the 1st of September of each year either side may reopen the wage scale question only.

The Court: Is the New York Shipping Association the only other contracting party to these collective bargaining agreements?

The Witness: Yes, sir. Some companies do not belong to the New York Shipping Association, but after the agreement is made between the International Longshoremen's Association and the New York Shipping Association we go to those companies. There are not many. And we ask them in substance, "Are you willing to sign the same agreement as has been signed by the New York Shipping Association?", and they do. So we have agreements with all of those companies that are not members of the New York Shipping Association.

The Court: Most of the stevedoring companies are members of the New York Shipping Association?

The Witness: All of the stevedoring companies in the port, as far as I know, are members of the New York Shipping Association.

In answer to the judge's question, the general longshore, the checkers and people that have been in our industry for many years, all of those steve506

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dores are members of the New York Shipping Association. Since the war we have gone into the maintenance business, and there are some other groups that may not be members of the New York Shipping Association; but the New York Shipping Association negotiates the agreements for them with our committees. Maybe some of those companies are not members of the New York Shipping Association, but they go along with the agreements.

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Q. Will you tell us whether or not, Mr. Ryan, the locals in the port also vote on the agreement? A. Absolutely. It is in our constitution that the Wage Scale Committee shall be selected each year by the locals from Portland, Maine, to Hampton Roads. They shall be elected in the month of August. Of course in the case of the Canadian ports, Montreal, St. Johns, New Brunswick, and Halifax, Nova Scotia, they negotiate with the Canadian Shipping Association. Our three vice-presidents up there handle that in each port, and their wages follow close to those in the American ports. But a letter is sent to every local office from Portland, Maine to Hampton Roads, to elect representatives to attend the Wage Scale Conference, which by our constitution is scheduled the day after Labor Day, in September.

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The Court: And they have to conclude the Wage Scale Agreement in negotiations?

The Witness: Absolutely. The Committee negotiates until they get as far as they can with the employers. In other words, the final proposition—sometimes the Committee as a group decide to go back and recommend to their membership. In the case last October they did not agree to recommend. but they have to agree to submit it back to the

members before we can accept it from the New York Shipping Association

The Court: So each member of the I. L. A. gets an opportunity to vote personally on the wage scale agreement?

The Witness: Absolutely

Q. About how many union members have you in the port of Greater New York, Mr. Byan? A. I would be more or less guessing at it, because, as I say, those affiliated crafts that come in that we are discussing our agreements with, generally talking about the general longshore agreement with the checkers and watchmen who are members of the same local, the cargo repairmen, of which there are a small number—they do cooperage work. We call them cargo repairmen, so we won't have jurisdictional trouble with the national cooperage union. So we generally know in peace time the membership of that group, and we quote a figure. But now, with all of these other groups such as the carpenters, not experienced carpenters, maintenance men and watchmen—in fact we negotiated eight agreements with the New York Shipping Association where we used to negotiate four for the maintenance men, the watchmen, and two branches of what we call the bull stealers, grain stealers and so forth. It is sort of carpenter work that the international carpenters union let us have.

You asked me how many members. Of course the easiest way is to go to the tax book, but I have not got that record with me. But we figure that there are 30,000 of our men employed in the port of New York That is during war time. That now I think is reduced to 25,000 after the war.

Q. Having participated, as you have told us, as president of the Atlantic Coast District and ex officio chair-

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man of the Wage Scale Negotiating Committee since 1918 in all the agreements which have been worked out in that time, will you be good enough to tell the Court what the union objectives and purposes were, what they were trying to get at and trying to accomplish?

Mr. Goldwater: I object to the question as calling for an answer which is not relevant or material to any of the issues here. A written contract has been admitted in evidence by your Honor, and the contract speaks for itself. Anything leading up to its making it seems to me is entirely immaterial and irrelevant, and is entirely included within the final document.

The Court: For the reasons that I have already indicated I will allow him to answer. You may answer.

A. Myself personally, and I presume with what every member of the organization wants, my own personal experience working 12 hours a day was too when I went to work longshore in New York there were two organizations in the field, although the employers did not recognize either of them-what was known as the Independent Union, and in 1913 the heads of the Longshoremen's Union Protective Association, which was an initial organization in this port, and the I. L. A., which was trying to organize, got together and asked for a conference with the employers. This was not granted, but the employers that September-and that is how we came to negotiate the agreements in September-put signs on the piers that on October 1st the wages would be raised from 30 to 33 cents an hour. The overtime work was 45 cents, and the Sunday rate was 60 cents. We had three rates at that time. That was in 1913. So that gave especially the younger men coming on the waterfront,

it gave us the idea that the minute we endeavored to unite we gained three cents an hour.

In 1914 we took over into our membership the entire membership of the Longshoremen's Union Protective Association. So that in 1915 President O'Connor came in from Buffalo as chairman of the Shipping Board, and he arranged a meeting with the Transatlantic Shipping Conference Committee, and I was a delegate from the District Council through that agreement in 1915.

> The Court: I do not know whether this is the 518 history Mr. Taylor wants or not.

> The Witness: He said from 1918, but I think what Mr. Taylor wants is what was our objective. Our objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. Before there was any union we had double time for Sunday. We wanted to work in the daytime. We figured we only live once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steam- 519 ship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry. when they found it too expensive to do it in any other way, have been done.

Q. Do the men object to working outside of a normal day! A. Absolutely.

Q. Will you give us some illustrations, and tell us why it is sof A. The men-of course bringing them from 30 cents an hour without a strike, right up to \$1.25 and

\$1.875 an hour, wanted to work it from ten hours to eight. Incidentally, there are only two rates now. In the last war the employers, ourselves and the United States government arranged that our conditions would be set by what was known as the National Adjustment Commission. In the first year, 1917, there was on that Commission one of the employers, Mr. Tappan, our president Mr. O'Connor, and an independent man, Mr. Palfry. In 1918 that continued. In 1919 they made it a five-man committee—Mr. O'Connor, myself, Mr. Oakley Wood of the Barber, a Professor Ripley representing the United States government, and in 1917 their findings were that we would have two rates of pay. They gave us the 44-hour week, 8 to 12, 1 to 5 and 8 to 12 on Saturday, 65 cents an hour straight time and \$1 an hour for overtime, and that has been continued ever since.

In 1919 the war was over. We had done our job and the Commission was abolished, and we continued collective bargaining ever since, but now the two rates of

pay-

The Court: You say there has not been a strike in the industry since when?

The Witness: Since 1907, except in the coastwise end of it. There has not been a strike in the deep sea since 1907, until what they termed the strike, in the first part of October of this year. The men never lost any time to gain wages or increases by a strike. There were stoppages of work, but never a strike since 1907 until 1945.

- Q. Directing your attention again, Mr. Ryan, to the matter of whether the men do or do not want to work outside of the normal day, will you expand and amplify that a little bit! A. I can give you concrete evidence that that is the case.
- Q. Go ahead. A. I will until I am stopped. I do not want to be guilty of misconduct in court.

During the war, as the records show, we were all grouped together under the Collector of this port. Some of the questions that he asked Mr. Nolan this morning, we know they are facts, because the Collector of the port issued statements, but we do know we have been commended all over. We figured it was our duty to do the job. In the last war we manned what were known as stevedore regiments. We sent out experienced foremen overseas, under the army's guidance, and did a job. In this war they had what they call port battalions. We manned them and furnished them with some of our best men. The "P.Bs" and other groups of laboring men were sent in, and we received high praise for the manner in which our work was done, the volume of business, the tonnage turned out in this port, in this Atlantic Coast district as against other districts, which I do not want to go into.

The men from 42nd Street to 59th Street-that is from Pier 84 to Pier 97-most of those men have moved out of that district due to the unsanitary conditions, and so forth. We have never been able to get so many things for the west side, but many of the men had moved out to Long Island, and they said, "Now, listen, we go in there and work like hell on these war cargoes", because we were handling a different cargo. Instead of coffee and flour, 525 we were handling jeeps and all that sort of thing, and the men told their representatives up there, and the New York District Council, they said, "We cannot work day and night and do a job. We will come in at 7 in the morning, or we will come in at 8 and work until 6," for which there would be eight hours straight and one overtime. If they came in at 7, that was two hours overtime, and go home and be fresh the next morning "and we will be back at 8 o'clock in the morning." They said, "We want to knock off and go home." We knew there was additional labor needed on this waterfront. Many of our boys went, and we knew and hoped they were coming back to go into the industry again,

and our agreement with the employers read that we would

prefer them for work.

We knew that there were men in Harlem and in Brooklyn who never worked longshore, who were being organized by people outside of our organization, who made plenty of money on those men. We knew there were some Southern ports that were engaged during the war, or before the war, on coastwise business. The War Shipping Administration took over all their ships, and those men were out of work. They came and lived in Harlem. Some were experienced men, but the average did not have experience, and the employers and ourselves found that out, and we tried to confine them to handling ballast or some of that bulk cargo, where they did not need experienced men. We did not take one penny from those men. We are very proud of that fact. We took nothing from them, because we figured when the war would be over our own men would come back and they would want their jobs back and we would have to tell those men to leave the waterfront.

However, we did know that some of those men were becoming experienced, and we issued two extra charters, one known as "824, Series 1, Uptown", and one known as "1258, Series 1, Downtown", in which we took some of those men that were acquiring experience. We took colored men into all of our locals, except one colored local that desires to be by itself. That has been in existence many

years. They wanted their own local.

We took in a group of those men, and we got Harry Wills, and he got a salary for recruiting those men and putting them into those new locals. Later on uptown these men said they would not work nights. Then Furness-Withy and the rest of the people up there—the colored men had never worked in that section. But the employers said, "We will have to bring the colored men in and work nights." They said, "Let them bring them in and let them work nights."

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Now, Harry Wills has gone around to 1,000 or 1,200 men and gotten—

Mr. Goldwater: Now, if your Honor pleases, it seems to me that this is entirely irrelevant.

The Witness: I knew I was going to be stopped, but I was going to talk as long as I was telling the truth.

Mr. Goldwater: There is no question about your telling the truth. Nobody questions your telling the truth at any time. We want to restrict your testimony to what is relevant in the case.

The Witness: I want to say this, if it is permitted, that the men that are arguing this suit are non-union members who do not know anything about how our organization was built up.

Mr. Goldwater: I say to your Honor that whether they are union men or non-union men is not material.

The Court: Strike it out.

The Witness: All right, I say it is that they worked overtime all the time, and that is what they want, time and a half on time and a half.

Mr. Goldwater: We will show that the records contradict what you say, Mr. Ryan, despite the fact 531 that you tell the truth.

The Court: Obviously we are not going to get anywheres that way.

By Mr. Taylor:

Q. As I understand it, this story which you have just told us, you were going to give us as an illustration of the fact that the men in the union did not want to work at night, even in the wartime conditions, but they allowed these other men to come in and take the night time work because they did not want to work at night? A. Yes.

Q. Will you please give us any further illustrations that occur to you that tend to support and corroborate your statement that the union does not want night work and the men do not want night work?

Mr. Goldwater: I object.

The Court: Sustained. Has the union ever taken any formal action on the matter!

Mr. Goldwater: I object to that as immaterial.

The Court: I will allow it, nevertheless. Well, I should say, to avoid any further discussion that I always invite objections to any questions the Court puts. I gladly entertain such action. I overrule the objection.

Has the union taken any formal action expressing, by resolution or otherwise, an opposition to night work, other than the fact that it appears from the contract—

The Witness: I would say in answer to that that while we may never have taken formal action on it, that the employers for about four years insisted on it going in the contract before we signed it. You know, in 1921 we got cut, or reduced, so much so that the employer was the boss. We either had to take that agreement or none. We done the best we could, and they put it in there; I mean for four years straight it was in there. The men would not work nights. You would not see any men, and then before they would sign an agreement with us they put it in there that the men must work every night of the week if required to do so, including Saturdays.

The Court: That is still in the agreement?

The Witness: I do not know, I guess it is carried ever since. That is the reason our men did not want to work nights, and they put that in before they would sign the agreement.

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Q. How about this clause, in the same part of the agreement, Mr. Ryan, which says that on Saturday night work shall be performed only for finishing a ship sailing on Sunday, or to handle mail or baggage?

Mr. Goldwater: I do not know what the question means.

The Court: Objection sustained.

Q. How did that clause happen to get into the agree-

Mr. Goldwater: I object as immaterial. The Court: Sustained.

Q. Was that clause put in at the request of the employers or the men!

Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: Yes.

A. The answer to that is the men were not working Saturday nights, and the employers put in there that we would at least work the mail and the baggage.

Q. There is a provision in here, Mr. Ryan, to the effect that if men who have not been employed on the premises in the afternoon are called back in the evening, they are supposed to get at least four hours pay? A. That is right.

Q. What is the history of that clause in the agreement?

Mr. Goldwater: Objected to as immaterial and irrelevant.

A. The employers had to give us the four hours, or they would not get any men.

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Q. That is, they did not want to come back to work just for a couple of hours; if they came back it was to be worth while! A. The employer had to guarantee us four hours, to any men around.

Q. What in your opinion, Mr. Ryan, is the purpose of the overtime provisions in your collective bargaining

agreement?

Mr. Goldwater: I object to that on the same grounds.

The Court: I-will allow him to answer it again.

A. Every labor organization, CIO or AFL, ourselves, tried to make night work so expensive that they will work in the daytime. That is the only answer to it.

The Court: I did not hear a motion to strike out.

The Witness: You cannot strike it out from our memories. I am not trying to be facetious, Judge.

The Court: I understand. /I was.

de During the war, Mr. Ryan, was there a conference held here in this port for the purpose of deciding whether or not, in order to meet the wartime needs, you were going to work around the clock, or only part of the night, or how you were going to meet the problem mest efficiently? A. I recall at least three conferences in General Groninger's office? He was head, at least three times during the war, of—

Mr. Goldwater: The question was whether there were any conferences.

The Court: The answer is yes.

Q. Will you please tell us what conferences? A. I was just saying who was president of the conference. I see now that Counselor Goldwater does not want that. I will say there was a Council called by Mr. Groninger.

The Court: Don't pay any attention to Mr. Goldwater.

The Witness: He is not going to wreck our organization.

Mr. Groninger, he would call all of us in. Our representatives were called in and the matter was discussed, and the War Shipping Administration kept insisting to work around the clock, the minute a ship comes in work it right around the clock, get it out, and sometimes a ship would lay there two or three days. We all the time resisted. We said we never want to get that habit for peace times of working around the clock, and if we establish it in war time it will be a precedent and they will follow it through. And we finally prevailed upon all of the interests not to work around the clock, only when it was necessary, absolutely necessary; to do as little night work as possible, so that the men would be fresh to do the work that they could do in the daytime. Several of those conferences were held.

Q. Mr. Ryan, did it come to your attention that a suit was brought by some longshoremen up in Providence, similar to the suits which are brought here? A. Absolutely, it was called to my attention.

Q. In which they were seeking, as these men here seek, pay in addition to what they got under the terms of your collective bargaining agreement?

Mr. Goldwater: I object.

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The Court: Objection sustained.

Q. You knew about that suit, and you knew about this one, didn't you? A. I am afraid to talk to you, the

objection will be sustained.

Q. When you learned that the suit had been brought up there, did the Council here take any action with reference to the matter? A. Our Atlantic Coast District—

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Mr. Goldwater: Just a moment. I object. The Court: I assume he is referring to "Council", with a capital "C".

Mr. Goldwater: I must ask that the question

be repeated.

Q. (Read.) A. You mean the organization here! A. Yes.

Mr. Goldwater: That is what I did not understand, what organization he meant.

The Court: The I. L. A.

The Witness: It was the Atlantic Coast District.

The Court: Of the I. L. A.

Mr. Goldwater: I object to the question as entirely immaterial and irrelevant; what action was taken here on a suit brought elsewhere is entirely immaterial and irrelevant.

The Court: I am inclined to agree with you, but counsel has a right to put it on the record, so I will sustain the objection. But you may put it on the record.

The Witness: The Atlantic Coast District.

Mr. Goldwater: I do not understand your Honor's ruling.

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The Court: Under the Federal Rules of Civil Procedure when an objection is taken to a question counsel offering the question may nevertheless elicit the answer and put it upon the record, so that the Circuit Court can review the question.

The Witness: Thank God for that.

The Court: It is a practice which would not be suitable before juries, but you can see it is relatively harmless.

Mr. Goldwater: Is the stenographer permitted also to put on the record Mr. Ryan's asides! I think they are extremely important.

The Court: He is doing the best he can.

Mr. Taylor: I think a little wit in a dry case like this is a good thing.

Mr. Goldwater: That is why I want them.

The Witness: The judge says what the counsel's rights are; I do not know what mine are.

The Court: You just answer the question until I tell you to stop. The question is what action did the District Council for the I. L. A. for the Atlantic District take with respect to the suits.

The Witness: We were meeting every three months, the Atlantic Coast District executive board, at which every board is represented. When this question came up, about what happened at Providence, our Council went on record as being opposed to trying to get time and a half on time and a half, as it might wipe out all of the gains we had made for our men over a period of 25 years. We opposed the suit. It was mentioned—of course that is stricken off the record—and the Atlantic Coast District decided that they would oppose any sort of these suits that were brought.

Q. Is it a fact, Mr. Ryan, that the union here in New York has always considered, and still considers, that the

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payment practices which the stevedores have followed are in compliance with the Fair Labor Standards Act?

Mr. Goldwater: I object.

The Court: Objection sustained.

. Q. Would the method of payment prevailing in this port have been acceptable to the union?

Mr. Goldwater: I object.

The Court: Sustained.

Mr. Taylor: May I have an answer, as an offer

of proof?

The Court: Yes.

A. Absolutely; yes.

Cross Examination by Mr. Goldwater:

Q. May we start with the last answer, Mr. Ryan. Is it your opinion that the payments are in compliance with the contract, even if that violates the Fair Labor Standards Act? A. I do not understand that question.

Q. All right, I will: let your answer stand, that you

do not understand. A. Wait a minute.

The Court: That is a perfectly satisfactory answer. If you do not understand the question it is

up to counsel.

The Witness: I do not understand the question. I say that our contract does not violate the Fair Labor Standards Act, or we would not have signed it, if that is the way I am going to be hamstrung here. I do not mean you, Judge, but I say you explain the question to the other guys. I will understand the next one you ask me. I understood that one, but you were putting two in one.

The Court: All right, put your next question.

Mr. Goldwater: I want to be sure Mr. Ryan is
through with his comments, first. He must have
plenty of opportunity for comment.

The Witness: Yes, but I do not get a chance to

answer the question, so that is all right.

Q. You got a chance to answer that one. That was the first one I asked you. A. I asked you to explain it. Q. I asked you one question, just one question.

The Court: We are getting no place at all. Now put your next question.

Q. Now, Mr. Ryan, you have said that the men—and I assume you were speaking generally of all men who are longshoremen working in the port of New York—objected to working nights? A. The majority.

Q. And has that been true for many years? A. Many

years.

Q. It has been true as long as you have had anything to do with this industry, which goes back, according to your statement, to 1912? A. Yes.

Q. Has the question of working nights been raised each time a new contract was negotiated, since you have first had anything to do with the negotiations? A. What was your first word there?

Q. Has the question been raised, the question of working nights been raised each time a new contract was negotiated? A. Yes.

Q. Has the position of the union always been that it objected to the demands of the Shipping Association members that the men be required to work nights if the Shipping Association members wanted them to? A. We said we should be only required to work nights when it

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was absolutely necessary. We did not want to stifle our industry.

- Q. That is, was the negotiating committee's position that it accepted the clauses in the contract, which, as I read them, have been there repeated and repeated and repeated, that the men would work nights when required? A. Yes.
- Q. Now you have said that the objective in the negotiation with respect to this overtime and night work business has always been that the men felt that they should be required only to work during the normal day hours; isn't that correct? A. As far as possible and still to meet the needs of the industry.
- Q. It is not in the best interests of the industry, I mean from the shipowners' or the stevedores' standpoint, from an economical standpoint, to pay overtime, is it? A. Of course not. If we make it expensive enough they will work only in the daytime. We feel they will adjust the industry as close as possible to daytime work.
- Q. And the requirement then that has always existed is of a very substantial difference in compensation for work after 5 o'clock and work before 5 o'clock? A. That is right.
- Q. That requirement was designed then to force the industry as far as possible to employ men in the daytime? A. Absolutely.
 - Q. You put a premium on a penalty?

Mr. Taylor: You interrupted him.

Q. Did I interrupt you, Mr. Ryan? A. I was about to say that overtime, with that overtime we introduced a new innovation in our agreements. The employers say it cannot be done in the steamship industry, but when we make it expensive enough for them they come pretty near generally doing it.

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Q. Has there been innovation with respect to the difference between the night pay, pay after 5 o'clock at night, and the day pay for the last 20 years in the industry? A. Ever since the National Adjustment Commission made, it two rates, 65 cents and \$1, we have continued that sort of time and a half over the day rate. We make the day rate as high as we possibly can get it, and then make the night rate as high as possible.

Q. It has not always been \$1.50? A. No, it was 70 cents

an hour at one time.

Q. I said \$1.50. I meant time and a half. It has not 560 always been exactly time and a half? A. No, but pretty close to it.

Q. There was a time when the union was required to take a cut, would you say! A. That is right.

Q. That pressure existed and continued for two or three contracts, did it, or more! A. A year and a half.

Q. Only a year and a half? A. They had a clause in the agreement then. It was their way. They had a clause they could open it up on March 1st and adjust wages.

Q. In what year are you referring to? A. 1923; on April 1, 1923 we got 5 and 7 cents an hour award from the Goethals Committee. We were looking for 5 and 10.

Q. Prior to the 65 cents for daytime work the rate was 80 cents, was it not? A. Prior to the 65 cents and \$1.

Q. Yes. A. It was 50, 75 and \$1.

Q I am afraid I will have to show you the contract, Mr. Ryan. I think you are mistaken. A. I know I am net. Prior to 1917?

Q. No. Oh, you are talking of the 65 cents in 1918, are you! A. No, sir; 1918-1917 we got 65 cents. You mentioned the 65 cents. I do not know what you are talking about.

Q. You talked about 65 cents and \$1. Now what years were you speaking of when you mentioned 65 cents and

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\$1? A. The year that it was granted, I believe it was in 1917. You say it was 1918? I believe it was 1917.

Q. It would appear from the schedules you have that August 1, 1917 to September 1, 1918 it was 50 cents and 75 cents. A. 50 cents, 75 cents and a dollar; that is right. In 1918 we got 65 cents and \$1.

Q. In 1918 it was 65 cents and \$17 A. Yes.

Q. After that, in 1919, 1920, effective as of December 1, 1919, it was 80 cents and \$1.20? A. That is right.

Q. And continued 1920, 1921 at 80 cents and \$1.20? A. Yes.

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Q. Exactly one and a half times? A. Yes.

Q. In 1921 and 1922 it went back to 65 cents, didn't it? A. Yes.

Q. And it continued 65 cents in 1922 and 1923? A. That is right.

Q. It went to 70 cents, beginning effective April 1, 1923, 70 cents; is that your recollection? A. Yes, April 1, 1923, it went to 70 cents and \$1.07.

Q. That is right. A. That is right; we did not get the time and a half there. We lost a half a cent.

Q. You got a little over, you got 2 cents more? A. We figured a nickel in the morning and a dime in the afternoon. If we were looking for double time we got a dime in the afternoon.

Q. And the reason for the objection on the part of the men, as you know it, to work the night work, has always been the same? A. It has improved greatly, or enhanced greatly in the last 20 years. In the old days the men who did not belong to the union were not able to gain the objectives, but we know now they found out that the working man can enjoy the different things. That is why we want Saturdays, Sundays and nights off. So it has been greatly improved in recent years, as to why they want to cut out night work.

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- Q. I do not understand what you mean when you say the reason has been improved. A. Your men can have more time for relaxation. In the old times all they could do was to stand around the corner when they got through work.
- Q. You mean they urge it more, the urgency is greater for day work now than it used to be? A. Because this country is a better place to live in. We are getting more of the so-called luxuries—until the Communists put us on the bum.
- Q. There may be greater pressure, greater urgency, but did the same objectives apply? A. Absolutely, only more forcefully.
- Q. And the purpose of the union in negotiating for the men has always been to make the night pay as high as possible, to discourage employing men at night? A. That is right.

Q. Now, Mr. Ryan, the amount of this night pay, as far back as you have told us, has always been approximately 150 per cent of the day pay? A. Yes.

Q. And that ratio had no relationship whatever to the adoption of the Fair Labor Standard Act, did it? A. I do not understand your question. You say that is the answer. I feel this way, that other organizations—we did not need the Fair Labor Standards Act. We were able to collective bargain, and by that bargaining made an eight-hour day and time and a half for overtime, which every other organization aspired to. Sometimes they get double time. Generally it is time and a half. We have that without the Fair Labor Act. The only place it helped us was if a fellow was fortunate enough to work eight hours a day, Monday, Tuesday, Wednesday, Thursday and Friday, that before the Fair Labor Act he had to work Saturday morning for four hours at the single rate of pay. After the Fair Labor Act came in, if a man

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could work those times—it is very seldom a man works five straight days of eight hours, but if we worked five days, Monday, Tuesday, Wednesday, Thursday, Friday, previous to last October, before the Fair Standards Act came in, Saturday morning, due to our 44-hour contract, we had to work four hours on Saturday at the straight pay that you got on Monday or Friday. When the Fair Standards Act came in, then on Saturday morning, if we worked one hour on Saturday morning or two hours or three hours or four, we got time and a half, provided we had the 40 hours in in the previous five days.

Q. And you would be sure that if a previous witness in this case said that that was not—I withdraw the question. That is not important. A. I have got the answer waiting for you.

Q. I beg your pardon? A. I knew the question. I have got the answer waiting.

Q. We both know the answer, so it is not important. A. No, we think differently. You are a lawyer, and I am not.

Q. I think we think the same on that question. A. No, we don't. You think it is the 41st hour.

Q. Well now, let us take that up. What would the man working Saturday morning get paid if he worked five nights during the week for eight hours! A. Previous to last October he would get \$1.25. Now he gets \$2.25.

The Court: What happened last October?
The Witness: Last October the Davis Award went into effect, and they gave us the 40 hours.

Mr. Goldwater: That is not in this case.

The Witness: It is in here all right.

Mr. Goldwater: I ask that the answer be stricken out as not responsive.

The Witness: Might I say, Judge, if I may be

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allowed to say this: this is a very important case to our organization.

The Court: I have not any doubt about it.

The Witness: And there are people in court here who are leading the rank and file of the membership of our organization. They are waiting for me to break, and I won't. That is why I am making these remarks. It is no facetiousness, but the eyes of the world is on this thing. It is a very important case, and may knock down everything we have built up in 30 years.

Mr. Goldwater: I move to strike out the answer.

The Witness: Sure, it is in the minds of the people out here.

Q. That is all you care about. I am concerned only with answers to the questions. A. I will try and confine myself to them?

Q. I will appreciate that, Mr. Ryan. I know you can. Now will you answer my question if I make it a little more specific, so that it won't include any period beyond October last. I want to know, during the years 1943 and 1944, and prior to the Davis Award, if a man worked five nights, eight hours—and by "nights" I mean hours after 5 p. m. at night—and then worked Saturday morning—

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Mr. Taylor: And no daytime hours?

The Court: Disregard that.

, Mr. Taylor: I want to be clear.

The Court: The question is clear.

Q.—what would his rate of pay be, Mr. Ryan, for Saturday morning? A. It would be whatever the basic day pay rate was.

The Court: \$1.25?

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The Witness: Well, he said 1942 or 1943.

Q. No, I said 1943-1944. A. In 1943 we were getting \$1.25 and \$1.875; for the five nights he would get \$1.875. Under the contract for the four hours on Saturday morning he would get the rate specified in the agreement, \$1.25.

Q. But if the man worked only three nights, eight hours apiece, and Saturday morning, what would he get for the nights and what for Saturday morning? A. He would get \$1.875 for the three nights, the eight hours at night, or

24 hours, and \$1.25 for Saturday morning.

Q. And if the man worked prior to Saturday only, 10 hours each night for five nights in other words 50 hours at night-and then Saturday morning, what would his rate of pay be? A. \$1.25.

Q. For Saturday morning? A. Saturday morning.

Q. And if he worked at night a total of 50 hours, 10 hours a night for five nights, would he be paid, Mr. Ryan, exactly the same rate of pay for each of the hours on the fifth night, on Friday night? A. Absolutely; he would get the rate called for, \$1.875...

Q. You understand, of course, Mr. Ryan, that in the cases I have just put to you I have assumed that the man worked no day hours prior to the night work? A. Yes.

Q. You understood that? A. Yes; you have pointed that out. I did not assume it.

Q. Mr. Taylor thought it was not clear, and I wanted to be sure you understood it. A. I am not paying him.

Q. Now, Mr. Ryan you have said in the very early part of your testimony, in answer to his Honor's question I think it was, that the only parties to the contract—and I speak now of the contract which was effective as of October 1, 1943 A. Yes?

Q. -were the New York Shipping Association and the union. Don't you want to correct that? A. When did I say that?

The Court: Well, is that the fact? If you want to change it change it.

The Witness: The question, I believe, was were we the only longshore organization in the port. I said yes, that our agreement was with the New York Shipping Association. I said yes, but that there were certain companies who were not members of the New York Shipping Association that were bound by that agreement.

Q. Well, Mr. Ryan, apart from the certain companies 578 who are not members of the New York Shipping Association, was not the Deep Water Steamship Lines a party to the agreement? A. Yes.

Q. And is that a group of an association designated?

A. No. sir.

Q. Under that title? A. No, sir; we know them as members of the New York Shipping Association.

Q. They are separately designated as the Deep Water Steamship Lines in the contract, besides the designation as New York Shipping Association! A. I do not want to mention anything that is not in here. I do not want to embarrass any companies. There are some deep water lines that are still not members of the New York Shipping Association.

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Q. Was it those lines you were referring to when you answered his Henor's question that there were others who were not members of the New York Shipping Association?

A. Yes.

Q. How about the contract stevedores of the port of New York! A. They are members of the New York Shipping Association. They have representatives on the committee that negotiate the agreements with us, or discuss grievances, but they are all members of the New York Shipping Association. If there is an odd one that is not

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Q. I am inquiring as to whether they are a separate group or association? A. They are all members of the New York Shipping Association.

Q. They are, however, separately mentioned, apparently, in this agreement? A. So we make sure we get everybody and the companies do not get any of them.

Q. You were present at the negotiations, and I assume at the signing of the agreements for many years? A. Yes, I have been on every committee since 1915.

Q. And these agreements have for many years past spoken of a basic working week consisting of 44 hours; is that right? A. Yes.

Q. Now the agreement effective in 1941, in 1942 and the one effective October 1, 1943, were all negotiated and executed after the adoption of the Fair Labor Standards Act, were they not? A. I presume so. Is do not recall the date.

The Court: October 24, 1938. The Witness: Sure, yes.

Q. And you were aware of the provisions of the Fair Labor Standards Act when these agreements were negotiated and executed, were you not? A. To a certain extent I guess I was familiar with them.

Q. You knew what the maximum number of hours were for each of the three years? A. Yes.

Q. Will you explain, Mr. Ryan, why the contracts continued to speak of a basic working week of 44 hours, when you had knowledge of the existence of a statute which made a week of 40 hours under the Fair Labor Standards Act? A. For several years our proposition to the employers—before the Fair Labor Standards Act went into effect our proposition had been to the employer 40 hours a week, five days a week, and they always refused it and said it was not applicable to the steamship

industry. The agreement that we signed, we knew that if it was in effect that there would not be a ship there for the full 40 hours a week, and we knew we were protected under the Fair Labor Standards Act, that if we worked more than 40 hours in your 40-hour week, that the 41st hour would be time and a half.

Q. Mr. Taylor asked you if you knew of the existence of the suit in Rhode Island? A. Yes.

Q. And you were prompted to answer that you did. Do you know whether that suit had for one of its objectives an attempt to recover for the men the overtime rate for Saturday morning work which had not been paid prior to the suit? A. Our organization was endeavoring to secure from the contractors the pay for the 44 hours on Saturdays that was over the 40 hours, and was not in accordance with the Fair Labor Standards Act. Our organization was trying-the contractor was not a regular contracting stevedore, which is irrelevant, of course. It was the hoisting people here, but the Navy was the fellow who had to pay the money. On a certain date they paid the money, and we had, I presume, a year or two back money coming, and we could not get that pay, and the organization was arguing it out with the Navy, and when the fellows that came from other towns into Providence and then went to work on this job, one or two of them were fired, and they started the suit.

We went down to Washington, and they immediately gave us the back money, and we backed out of the suit.

Q. But the overtime was not paid in the Providence area for Saturday morning work generally, was it! A. It was not paid there by orders of the United States Navy, or the government itself, until we proved that they were violating the Fair Labor Standards Act.

Q. And a suit was brought, and as a result of the suit double pay, or rather time and a half pay, was given for

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Saturday morning? A. I would say it was expedited. We had been getting it for some time before the suit was brought. It was the retroactive pay that the Navy was

holding up.

Q. Were these employees all employed in the Navy yard, Mr. Ryan! A. They were employed in Davidson-ville. I have not been there. It was a Naval Reservation, and they had the Fuller Construction Company doing the work with all the supervising stevedores. There was no contracting stevedore there. It was the Navy itself.

Q. You say you have never been at Davidsonville? A. No.

Q. You do not know what sort of work was being done there? A. Oh, yes, I do. Vice-president O'Malley reported to me what was going on. My information was that it was strictly a naval reservation. There was mostly naval work and mostly handling of ammunition.

Q. Were not longshoremen, working on materials that were being shipped overseas? A. That is right, but there was no contracting stevedore doing the job. The Navy had some fellow to run it for them. He had a contracting business, but he did not bid on it. He just worked for the Navy and the Fuller Construction Company. But I might add to it, Mr. Goldwater, they were our membership and our representatives had access to the piers and the cooperation of the company.

Q. You mean men in your membership were involved in this situation? A. Yes.

Q. When you say that the employing stevedore was not a member of the association of the Atlantic Coast—A. Yes, John C. Orr was a contracting stevedore, but they could not get this contract. They hired him as a supervisor. The Fuller Construction Company had the contract. They had a better pull with the Navy than we did.

Joseph B. Ryan—For Defendants—Re-direct. Joseph B. Ryan—For Defendants—Re-cross.

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Q. But the man who was hired was a member of the North Atlantic Coast Shipping group? A. In each port they have an employers group, but in the New England ports John C. Orr was the stevedore there. He would sign the agreements. It was negotiated in Boston.

Q. He was a member of that group that signs an agree-

ment with your union? A. Yes.

Re-direct Examination by Mr. Taylor:

Q. Mr. Ryan, after the payment was made that you have told us about, up at Davidsonville, you know don't you, that the suit still continued and they are now trying to get time and a half on time and a half, just like down here, and that is what your Council voted that you were not in favor of? A. Yes, but our membership withdrew from the suit when we gained our objective to get the retroactive money, and left it to the two men that had been fired by John C. Orr.

Q. But what you are referring to as being opposed by the I. L. A. Council is the continuation of the Davidsonville suit, trying to get time and a half on time and a

half? A. Absolutely.

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Re-cross Examination by Mr. Goldwater:

Q. When Mr. Taylor says time and a half on time and a half, you know that he is referring to time and a half on the night rate, don't you! A. And the night rate is time and a half.

(Witness excused.)

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John V. Lyon-For Defendants-Direct,

JOHN V. Lyon, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Lyon A. 111 East 88th Street, New York City.

Q. What is your business? A. I am chairman of the

New York Shipping Association.

Q. How long have you been connected with the Shipping Association? A. Well, I am a member of the Conference Committee, beginning 1931, and I became a voluntary chairman in 1938, and I became the paid chairman in 1939.

Q. At the time of what we are calling here the Collective Bargaining Agreement, that is the one covering the years 1943 to 1945, were both of the defendants here members of the New York Shipping Association! A. The Huron and the Bay Ridge, yes.

Q. Do you know the number of members in the New York Shipping Association? A. At present we have about 140 or 145. There are about 52 steamship lines, about 68 contracting stevedores, and the rest are divided between watching agencies and contracting carpenters.

Mr. Goldwater: May we have those two first figures again!

The Witness: 52 for the steamship lines, 68 for the contracting stevedores, and the balance is split between contracting watching agencies, which A think is around 13, and contracting carpenters, which is about the same number.

Q. Has it been the practice for many years upon the execution of a collective bargaining agreement between the International Longshoremen's association and the

negotiating committee of the New York Shipping Association, to make up copies of it and circularize the industry? A. Yes.

Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: It is not very crucial either way, but I will allow it.

Q. That is, the Shipping Association, or the committee of the Shipping Association, would sign the contract for the Association! A. The Conference Committee signs it practically immediately it is brought up, they and the representatives of the I. L. A., and then after that it is promulgated to the other members for signature.

The Court: Are they bound by it as a group, or do they have to acquiesce in it individually?

The Witness: I am not a lawyer.

The Court: You do not know the answer? The Witness: No, sir.

Q. That is what I am getting at, whatever the legal answer may be the fact of the matter is that after the conference Committee has signed for the Association and Mr. Ryan, or whoever it is, has signed for the I. L. A., it is immediately then distributed by the New York Shipping Association and treated as in effect throughout the ports? A. Yes.

Q. Meanwhile you are sending it around and getting signatures from all the people who are members of your Association? A. Yes.

The Court: We will recess now until 2:15.

(Recess to 2.15 p. m.)

John V. Lyon-For Defendants-Direct.

AFTERNOON SESSION.

JOHN V. LYON resumed the stand.

Direct Examination Continued by Mr. Taylor

Q. Mr. Lyon, is it true that there came a time when Mrs. Schleifer or Mrs. Schleifer and Commander Evans or someone else from the War Shipping Administration were in touch with you with respect to having some statistical studies made with respect to straight time and over time in the port of New York? A. That is right

Q. Won't you please tell us about it?

The Court: Before you go into that, as I understand the stipulation the facts stated in the stipulation are deemed to be true. Now what more can you establish? Conceivably if the plaintiff were to offer evidence to show that although the facts are true they are not the whole truth in the sense that they are unduly selective or in some other way biased in a direction or contain some internal tendentiousness, then you might want to prove or offer proof that that is not so.

Mr. Taylor: I think the only reason. I was thinking of going into it, your Honor, is that when I handed counsel for the plaintiffs copies of the statistical studies they also wanted to have copies of the instruction sheets which were sent to the companies and they have asked me various questions, and from the fact that they reserved all rights other than the right to object because of the hearsay rule or the best evidence rule I thought that they were intending to somehow or other attack the significance or relevancy of these things, the weight which your Honor will attach to them.

anna.

The Court: They may attack any aspect of it except the truth of the studies. I don't know what more you can do.

Mr. Taylor: I don't know that I can do a great deal more. I am of course concerned to put in everything I could put in so your Honor will be able to look at these things and accept them as of some significance.

The Court: I don't want you to call this witness back in the event the plaintiffs should challenge it. I will ask Mr. Goldwater if he has any such expectation.

Mr. Goldwater: I undoubtedly have the expectation of challenging the weight of the evidence, of course.

The Court: By weight if you mean legal significance, there is nothing that this examination is going to help. If you mean the amount of credibility in that sense—

Mr. Goldwater: Oh, your Honor, no, I have no means of attacking credibility. Mr. Taylor has access to the records and produces the records. We say to him now, "Mr. Taylor, you have got to assume in accordance with the questions you ask you got truthful answers." I can't find that out unless I took two years to examine all of these things. And that is what we are trying to find out—the assumption that these are truthful answers and reflect the books accurately. is as far as we want to go. You call it truthfulness; we call it accuracy in our stipulation. we are trying to find out whether they would be accurate answers in respect to questions. certainly I am going to ask the witness the kind of question he was asked and the instructions that

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were given. I did it this morning and that has nothing to do with—

The Court: Then I don't want to circumscribe

Mr. Taylor if you are going to examine.

Mr. Taylor: May I make what I hope will be regarded as a practical suggestion? That I now turn Mr. Lyon over to Mr. Goldwater for examination and waive the Federal Rule that he cannot go into matters that I have not gone into and let him examine Mr. Lyon on the statistical studies.

The Court: Fair enough.

Cross Examination by Mr. Goldwater:

Q. Mr. Lyon, do you know anything about the facts or figures that appear on the statistical chart of your own knowledge! A. The only thing I know about them, that is, after consultation with Mrs. Schleifer and representatives of the War Shipping Administration we wanted to get certain statistical data, and we discussed the thing and arrived at a certain questionnaire that should be sent out to the lines, asked them to answer it. The replies were sent to me and I in turn sent them to the War Shipping Administration.

Q. With respect to Defendants' Exhibit D, for example, the letter was sent to the companies that you had indicated by letters on the chart, of which this copy was handed me by Mr. Taylor. Are you familiar with that letter! A. I know that that letter was sent out; yes, sir.

Q. Was the discussion with respect to the statistical material which Mrs. Schleifer or Mr. Taylor wanted discussed with you prior to the preparation of the letter! A. It was.

Q. Did you make any suggestion to them as to what material should be asked for in this letter of inquiry or instructions? A. Well, I probably did. What we were trying to strive for, as I recall it, a couple of years ago—

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Q. No. I asked you whether you made any suggestion, first. You say you probably did? A. I probably did.

Q. I would like to ask you if you recall the suggestion you made as to the material to be asked for! A. No. I do not.

Q. You don't recall that. Do you recall in this letter instruction the following: What number of such of instruction the following: 319,313 overtime man-hours also involve man-hours worked during each of the following straight time periods: (a) From 8 to 6 straight time hours; (b) from less than 6 to 4 straight time hours; (c) from less than 4 to 2 608 straight time hours; (d) from less than 2 to no straight time hours; (e) no straight time hours"? A. Do I recall

Q. Yes. A. Yes, I do.

Q. Do you recall any discussions with Mrs. Schleifer or anyone else representing the defendants with respect to the purpose of this information? A. Well, all I can say as far as the purpose goes is that we were trying to find out what the custom of the port was as to how men. worked; if they worked in straight time did they work any overtime; if they worked any overtime how many straight time hours they worked.

Q. You recall nothing more specific than that with reference to this particular instruction? A. I think that was the general tenor of what was intended.

Q. Do you recall any specific discussion with respect to the subdivision which pertained to the hours worked from 8 to 6 straight time hours, the subdivision (a), Mr. Lyon! A. Yes. They wanted to get-to break it down into whether the men worked a certain number of hours during straight time periods and if they also worked an overtime period.

Q. They wanted to know if the men worked any overtime period who had worked from 8 to 6 straight time hours! A. Yes.

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Q. Do you recall any discussion as to whether or not they should ask in this letter of instructions for information as to men who worked overtime who had worked 8 hours, specifically 8 hours? A. Not specifically, no, sir. I do not recall any discussion asking as to whether menworked 8 hours specifically.

Q. You mean there was no consideration so far as you know of the question, "Should we ask for overtime hours of men who worked 8 hours"? A. I don't recall that there

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Q. You don't recall that? A. No.

Q. You have no personal knowledge with respect to the substance of this Defendants' Exhibit D which came as a result of this letter of instruction? A. That particular exhibit?

Q. Yes. A. No. The only thing that I know, Mr. Goldwater is that I did confer with Mr. Nolan in arriving at what represented we thought representative trades, representative businesses that were done by various companies so as to arrive at what was about 70 per cent of the business of the port.

Q. In selecting the 70 per cent group, did you consider

specific names! A. Of companies!

Q. Yes. A. Yes.

Q. Are the names which appear on this chart the only group which would have made approximately 70 per cent of the business done in the port? I am talking of business in the sense of hours worked by stevedoring companies. A. I presume that you could extract one company and put another company in its place.

Q. Who determined which named companies should make up the 70 per cent? A. Well, I thought that I was fairly competent to judge who was doing the business in this port that would make up 70 per cent of the business done. I had been in the steamship business since 1913. We have

got a list of the contracting stevedores in this port. We have got probably 95 per cent of the steamship lines in this port. And I don't know—I am not saying this boastfully; I don't know any better source I could go to to get the information that they wanted.

Q. I am sure that you have background and informa-

tion sufficient to tell them the names of a number of companies which would make 70 per cent, I haven't the slightest doubt of that; and I haven't the slightest doubt also that you know the names of all the rest of the companies that make up the 30 per cent. The source of their inquiry is not challenged. A. Mr. Goldwater, I would like to say also that in making up this list we also try to get a balance between passenger lines, freight lines, the trades that they are in—I mean some Europe trades, Far East trades, all that sort of thing, so that we would strike a fair balance.

Q. How many of these companies were passenger line companies? A. Oh, I don't know. I could tell if I had the list now. If it was put before me I could very ensily tell you who were passenger lines and who are freight lines.

Q. Well, I will take the list of 17 companies on Defendants' Exhibit E, and we have been given this list by Mr. Taylor. A. H. Bull & Company. A. Freight.

by Mr. Taylor. A. H. Bull & Company. A. Freight.
Q. Freight? Exclusively freight? A. When I say
freight I am saying freight and no passengers. Freight.

Q. Tell us what you mean by that. A. The Bull Line is exclusively a freight line, does not carry passengers.

Q. Is that the name of a company, a stevedoring company or shipping company? A. No, Steamship line. They do their own work.

Q. They do their own work. That is what I am coming to. Now, the Associated Operating Company. A. Associated Operating Company is mostly freight, and a

few passenger ships carrying a very limited passenger capacity.

Q. Is that a stevedoring company? A. That is a stevedoring company which is an affiliate or subsidiary of Funch, Edie & Company.

Q. What is Funch, Edie & Company? A. Funch, Edie & Company are general agents for a large number of steamship lines.

Q. I would assume then that the large number of steamship lines are primarily in the cargo business, freight business? A. Except for what I told you, it is a small line that runs down to the Dutch West Indies. It has frequent sailings but does not carry a large number of passengers.

Q. Now, the Atlantic Stevedoring Company? A. Barber Steamship Line; entirely freight.

Q. And the Cunard White Start A. Freight and passenger.

Q. And what would be your answer as to percentage, if you can give it to me, of freight and passenger service? A. Of the Cunard Line?

Q. Yes. With respect to the tonnage or with respect to stevedoring work on freight boats against passengers. A. Well, the Cunard Line is considered a passenger carrying line, but it also carries a large amount of freight; and they also have vessels that are entirely freighters. But the number of men involved, Mr. Goldwater, in handling passengers is usually relatively small; the number of men that are used, the volume, in the handling of freight; the passengers are quickly discharged and fairly quickly loaded.

The Court: And they usually come off under their own motive power.

The Witness: Except their hold baggage; and

the stewards bring out their hand baggage, as you know.

Q. Jarka Corporation. A. Jarka Corporation? Well, you know Mr. Nolan was on the stand; he has freight lines, and he did have in that period the Holland-American Line and he had the North German Lloyd, Hamburg-American—I suppose we shouldn't talk about that.

Q. Why not? A. —And German Lines. Those are the only two passenger lines that I can think of immediately

that they had.

Q. We are talking of the exhibit now, Mr. Lyon, that deals with the analysis of work hours of longshoremen in the port of New York covering the payroll period nearest November 1, 1938 to payroll period nearest August 31, 1939. A. Yes.

Q. And John W. McGrath Corporation! A. Freight.

Q. Exclusively? A. At that time I think so.

Q. Northern Dock Company? A. Northern Dock Company is freight. That is the Kerr Line.

Q. Pittston Stevedoring Corporation! A. Freight.

Q. Union Stevedoring Corporation? A. Freight and

passenger. That is the American Export Line.

Q. What would you say as to the division of work of longshoremen between passenger service and freight service? A. The same thing applies to all passenger lines. The number of hours spent of passengers is relatively small compared with that spent on handling freight.

Q. Is that a case in which there were some ships exclusively freight as there were in the other companies

that you mentioned? A. American Export?

Q. 4 am talking of the Union Stevedoring Company. A.

I am sorry.

Q. Wasn't that the last one I mentioned? A. Yes. I supplied the information that the Union Stevedoring

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does most of their work for the American Export Line. American Export Line has some freighters but most of their vessels are combination freight and passenger.

Q. Could you give us any idea with respect to tonnage of the proportion of exclusively freight and freight and passenger?

The Court: Tonnage of the ships. Mr. Taylor: Ships, yes.

A. How can you determine!

Q. You may not be able to answer my question. My question may be foolish. A. It is repetitious. The work done in handling passengers and their baggage is not great.

Q. I. understand, but there has been testimony that there is a difference with respect to the pressure on getting solely cargo ships out as against getting freight and passenger ships out. Therefore I would like to know—

Mr. Taylor: That is not a correct analysis of the testimony, if I may interrupt to say so.

Mr. Goldwater: You may interrupt to say so.

I haven't any objection.

Mr. Taylor: The difference between the freight and the freight and passenger with respect to the amount of freight—

Mr. Goldwater: I am not asking with respect

to the amount of freight.

The Court: I can't hear both of you gentlemen at the same time.

Mr. Goldwater: Would you repeat the question!

Q. (Read.) A. You would like to know what?

Q. Vhether you can tell me the ratio or percentage of the total which the cargo ships bear to the total with respect to the tonnage. A. The volume in this port! Q. Yes. A. No.

Q. You can't tell me what? A. No.

Q. All right. I am talking about only as to this company, you understand? A. Oh, as to that company?

Q. Yes, as to that company of course. A. Let's say probably 80 per cent of their ships are combination freight and passenger. Is that what you want?

Q. Yes, that is what I wanted to know. Now the Universal Terminal & Stevedoring Company. A. Freight.

Q. When you say freight am I to assume exclusively

freight? A. Yes, as I can remember.

Q. Huron Stevedoring Corporation? A. Huron is freight and passenger—that is, when I say freight and passenger I mean combination freight and passenger steamers with a small percentage of purely freight steamers.

Q. Do you know that on this exhibit, Defendants' Exibit E, there is a note that—I withdraw the question.

What about New York and Porto Rico Steamship Company? A. New York and Porto Rico Steamship Company do their own work or did their own work at that time. They have both freighters and combination freight and passenger ships.

Q. And can you tell us the proportion of each? A. No, I cannot, but I would say that it inclines more toward the combination freight and passenger than it does toward

purely freight.

Q. Moore-McCormick Lines. A. Both freight and passenger.

Q. The combination? A. They have both freight ships and passenger ships. When I say combination freight and passenger ships and purely passenger ships—
Q. And there can you tell me the percentage of each or the ratio? A. I couldn't give you the ratio, I think the percentage of passenger ships outweighs the freight ships.

Q. John T. Clark & Sons? A. Well, there again we

have a company that is comparable to Jarka Corporation. That is a large company and it has business all over the port. They did mostly freight ships and then they did some combination freight and passenger ships.

Q. Now Bay Ridge Operating Company! A. Bay Ridge Operating Company has both freight and passenger ships. I would say that the emphasis is on the passenger ships—wait a minute now. Let me correct that, please. Bay Ridge Operating Company have purely freighters, they have combination freight and passenger ships to carry—those combination freight and passenger ships carry large amounts of freight and then they have purely—not purely passenger ships—well, take the Monarch of Bermuda and the Queen of Bermuda which carry around 600 passengers and carry a small amount of freight and mail and express cargo.

Q. You are aware, are you not, that in the case of Bay Ridge Operating Company the information furnished on this exhibit is for the months only of July and August 1939? A. Well, if you say it is there it must be there.

Q. A footnote says that on this exhibit. A. Well, if it

is there, if that is what it says-

Q. Didn't you know that before, Mr. Lyon? A. I think that I did know it, Mr. Goldwater. It is not easy to assemble records, Mr. Goldwater.

Q. I think you have done very well. A. I mean some

have and some didn't.

Q. In connection with the Bay Ridge Operating you are familiar with the lines for which they do the stevedoring work? A. Well, I know that they do practically—well, they do all the work of Furness-Withy Line. They do the Swedish American Line. Is that what you mean?

Q. Yes. Do you know whether there is a difference between the volume of stevedoring work which they do in the summer months as against the spring, fall or winter months? A. Well, that would be a pretty difficult problem—very difficult thing for anybody to answer because the Bay Ridge Operating Company are doing business for Furness-Withy and they have a great deal of business in one part of the world and very little business from another part of the world; so it would not all come in a large volume at one time. It varies.

Q. Well, I understand you can't be specific as to percentages. I am asking you whether you know generally whether any season of the year is disproportionate to any other season of the year in their stevedoring work? A. It depends on what trade it is in.

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The Court: In other words, is July and August a typical part of the year?

Mr. Goldwater: That is right.

The Witness: I would say for a certain part of the Furness-Withy business it would be very great. Other branches of their business may be very small. I wouldn't know that.

Q. Would you know what the result of that would be with respect to its total annual business? A. There again I don't think that the months of July and August would vary an awful lot from the rest of the year.

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Q. That is what I want to know.

Q: You have no reason to believe that it is abnormal?

The Witness: No, I do not.

Q. What about Marra Brothers! A. Freight.

Q. And Turner & Blanchard? A. Freight with the exception as far as I can recall of one passenger line. That is the Norwegian American Line.

Q. Now in attempting to assemble this information did you learn or did you give consideration to the total approximate amount or relationship of the tonnage handled on ships which had combination freight and passenger as against the total handled or the man-hours relationship between the two things? A. No. What we tried to do is get a cross-section of the port.

Q. And who determined what would be what you call a cross-section of the port? A. Well, I told you before, without appearing to brag, I thought I was just as well qualified to do that as anybody else, and I conferred with Mr. Nolan who is on our committee and is also the chairman of the stevedoring committee of the Maritime Exchange, and I think the combination of his knowledge and my knowledge—I think we could arrive at something that is fairly accurate.

Q. Did you have any figures before you as to manhours worked and overtime work when you made your selection of those companies which would make approximately 70 per cent of all handled? A. No, sir.

Q. You did not? A. We did not.

Q. Did you have any information as to which of all the companies—which included the 70 per cent of the port costs which appear on the chart—approximate 70 per cent—worked more or less overtime? A. We didn't know what we were going to get when we asked these questions.

Q. Well now, you have pretty substantial familiarity with the practices of the companies in the port of New York, haven't you, with respect to this work? A. I know from my own particular experience that ships, combination freight and passenger ships, work more overtime than freight ships, and the amount of time spent on combination freight and passenger ships depends entirely upon the setup of the schedule of the lines.

Mr. Goldwater: Now if your Honor please, I think at this time in order to aid me in further cross-examination of the witness that we should

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call upon the defendants' attorneys to identify the companies on this exhibit against the list of names which we have. The only two companies which have been identified are the two defendant companies.

The Court: And a few others.

Mr. Goldwater: No.

The Court: Which were identified in the course of cross-examination on Jarka-

Mr. Goldwater: The Jarka Company got identified by virtue of the fact that a statement was 638 made that it was the largest and we naturally look to it for the largest number of man-hours.

The Court: My records show that Atlantic and Jarka were identified.

Mr. Goldwater: Atlantic was too. I beg your Honor's pardon.

The Court: And Jarka. I think the symbol for Atlantic was CA on one exhibit and A1 on the other. I don't know.

Mr. Taylor: Mr. Nolan has told me that it is EA for Jarka.

Mr. Goldwater: I assumed that it was.

Mr. Taylor: And KA is Huron and OA is Bay Ridge.

With respect to tying the name into the codes all I can say to your Honor is this: This information was obtained through Mr. Lyon's organization at the request of the War Shipping Administration. As I understand it at the time there was some reluctance on the part of the people consulted to furnish this sort of detailed information without knowing where it was going, and consequently it was treated as confidential.

The Court: I will not compel its production. It may have a bearing on the weight or inferences I

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shall draw but I will not compel its production.

Mr. Goldwater: In view of the testimony that has been given that there was a great deal more overtime work and there would be more overtime, naturally, for the reasons the witnesses have stated with respect to passenger service and with respect to purely cargo and freight service, it is impossible for us to comment in any way upon the testimony now.

The Court: I don't see that.

Mr. Goldwater: And to show to what extent that testimony is accurate and to what extent it is not. We have pure generalities here. You have certain charts from which—

The Court: But accuracy is no longer open to you to challenge.

Mr. Goldwater: Perhaps not in so far as accuracy with respect to these figures are concerned, but accuracy with respect to the conclusions of the witnesses and its effect upon this overtime practice, which is extremely important—

The Court: Well, now, let's get down to some practical limitations upon what use we can make of these exhibits. These other companies are not on trial. The only two companies that are on trial are the Bay Ridge and Huron. Now, with respect to those there are figures which have been identified.

Mr. Goldwater: That is right.

The Court: As far as the rest of it is concerned the only column that I will look at is the grand total in the sense that it gives a composite picture of the dominant portion of an industry and there, too, it has only limited significance. It has significance only in the sense that it is background material for the dominant conditions of an industry to the extent that they may have a bearing upon

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the issues of this case which are somewhat dubious to me at this moment.

Now whether or not company letter X is a particular company or another, and if so whether the facts relating thereto fit into the generalizations given by the witness or not, that would involve the trial of so many extraneous issues that I think I would exclude it as a matter of trial administration.

Mr. Goldwater: But, your Honor, it seems to us that whether or not the total of the companies which handle exclusively passengers and those in another category which handle both passenger and freight, and those which handle exclusively freight, whether the total hours worked by them overtime would bear out the testimony of the witnesses is not extraneous in view of the testimony your Honor has admitted.

The Court: You mean as to whether or not it is true that combination freight and passenger people tend to devote more of their time to overtime than straight freight carriers?

Mr. Goldwater: Yes.

The Court: Maybe that is true, but frankly I am not persuaded that that is a very important issue in this case. As a matter of fact, I am not at this moment persuaded that any of this is relevant. What I think is relevant is the employment arrangements between Addison and Huron and what his experience and history has been. And the issue has to be focused down to plaintiff and defendant. The rest is instruction. It may have sociological bearing. It may even have some economic bearing. But I am not convinced that it has legal bearing. I have let it in on the general theory that it is a good idea for the Court to be informed. That is

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the way courts get wise by listening to all this inadmissible evidence. If you will show me an issue which is really germane and which would warrant the delay, I would do one of two things. I would either exclude the stipulation and sustain your objection or compel the disclosure.

Mr. Goldwater: I say now, your Honor, that so far as this exhibit is concerned—

The Court: Meaning E!

Mr. Goldwater: —meaning E, and the same argument would pertain to D—so far as these exhibits are concerned we have testimony now of this witness and of other witnesses that a great deal more overtime was worked with respect to passenger freight combination or passenger ships than with respect to cargo ships alone.

The Court: All right.

Mr. Goldwater: Now, I say that we have a right to know—

The Court: Let me ask you first: Supposing it is true, what difference does it make? And (b) supposing it is false, what difference does it make?

Mr. Goldwater: Then I say if it makes no difference you should exclude the exhibits definitely.

The Court: I have, in a sense, reserved your right to make that motion or to move to strike out because it as received under the stipulation in which you reserved admissibility.

Mr. Goldwater: That is right, and your Henor now have made certain reservations although we have indicated that it has no very important bearing upon the issues—you have still made reservations under which I must press for the right to this information. If your Honor were to say to me, "I will exclude it," then, of course, I am not interested in the information. But as long as it is ad-

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mitted in evidence it seems to me I should have the right to the information.

The Court: Well, I shall rule at this time that I will not compel the disclosure of the names unless counsel for the companies from whom they were obtained are willing to disclose them. However, they thereby run the risk that if I should at the conclusion of the trial find that the line of examination that you want to pursue is germane then I may exclude the exhibit.

Mr. Taylor: Your Honor knows, of course, that they have all the names already.

The Court: Yes, but they have not got them identified.

Mr. Tayler: They haven't got them identified.

The Court: They know who they are in the gregate but they don't know which is which. this moment, frankly, I don't see how it makes any difference. Frankly, at this moment, I don't see what legal bearing it would have upon the issues of this case, whether it is true as claimed by the witness or by some witnesses that passenger vessels or combination freight and passenger vessels tend to have a history of more overtime than straight. freighters have. Maybe it has a bearing. I don't see it at this moment. If anybody wants to argue that it has I will be glad to listen to him at the proper time, but, not being persuaded that there is any great bearing, I don't want to direct that this information which has been obtained under a promise of confidence be disclosed at this time, notifying you all that if it should become germane you will have the opportunity to move to exclude it from evidence or-

Mr. Goldwater: Your Honor understands we

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haven't limited our objection to these exhibits alone!

The Court: I understand that.

Mr. Goldwater: I have no further questions,

The Court: I just want you to have this one thought. You will recall, Mr. Goldwater, that when I did receive this, I think I made some comment that in effect this was a table which I would perhaps have recourse to if it were published in the statistical analysis of the United States Department of Commerce.

Mr. Goldwater: Which would be quite different, your Honor.

The Court: The only difference is that, being an unpublished statement by an unauthentic organization, your stipulation of accuracy lends it a certain degree of credence which otherwise, of course, it would not have, and it would, of course, be inadmissible on any other basis. You have, therefore, stamped it with authorship of an important character. I still have doubts as to its admissibility.

Mr. Goldwater: Your Honor will understand that, of course, stamping it with authorship means that the witnesses—and I do not withdraw the accuracy stipulation—if we examine these witnesses for two years with respect to this examination—

The Court: You will get these answers.

Mr. Goldwater: That we would get these answers.

The Court: That is right.

Mr. Goldwater: What I have foregone in that is the right to challenge the accuracy only, the correctness with which the books are kept or whatnot. But that certainly does not in any way affect the issue-that is now—

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John V. Lyon-For Defendants-Re-direct.

The Court: It may be that I shall have to receive them for a very limited purpose, as it would be received for, anyway, as I think I indicated at the time of reception. But at this time I am not prepared to direct—

Mr. Goldwater: 'It seems to me that there is a vast difference between our stamp of approval which is designed to show that the witnesses would give these answers and the value of the information which is obtained.

The Court: That is true.

Mr. Goldwater: And the value of the information which you might obtain from a Government report. That is quite a different matter.

Mr. Taylor: Yes, but the precise question, of course, is whether your Honor's ability to evaluate it is affected one way or another by whether Mr. Goldwater knows what name goes with what code number.

The Court: That is the crucial question which I' am not disposing of now.

Re-direct Examination by Mr. Taylor:

Q. Mr. Lyon, I have shown you a letter which has at the bottom of it a notation to the effect that a carbon copy of it was sent to you. Does seeing that letter refresh your recollection at all as to the reasons why the figures received from the Bay Ridge Operating Company are limited to the two months of July and August, 1939? A. Yes, it does.

Q. What is the reason? A. They could not locate the records.

The Court: That is what you were told?
The Witness: That is in the letter.
Mr. Taylor: It goes a little further than that.

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The Court: He still hasn't got any information except that somebody told him so.

Mr. Taylor: That is right.

The Court: If there be an objection, of course,

I will sustain it.

Mr. Goldwater: Of course, I object.
The Court: The objection is sustained.

Mr. Taylor: Would you like to read the letter, or are you willing to accept the statement?

Mr. Goldwater: I am not willing to accept anything except information which a witness has of his own knowledge.

Q. Is this a copy of the letter, or did you receive a copy of this paper which I am now showing you? A. I think I did.

Mr. Taylor: I offer it.

Mr. Goldwater: I object.

The Court: Objection sustained.

Mr. Taylor: May I have it marked for identification.

(Marked Defendants' Exhibit I for identifica-

Mr. Tayler: That is all.

Mr. Goldwater: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Goldwater: Your Honor will recall that when Plaintiffs' Exhibit 7 was introduced we stated at the time that there were certain confirmations required—

The Court: Certain what?

Mr. Goldwater: A certain confirmation of a further statement which Mr. Taylor wished time to

check up. He has now had time and says that we are liberty now, subject to an objection which he will make, to read as part of Plaintiffs' Exhibit 7 an additional paragraph in that stipulation which would read as follows:

"7. Wherever it appears in the attached pages that a plaintiff worked 11 hours on a Sunday those hours were worked between 7 p. m. Sunday and 8 a. m. Monday; wherever it appears that a plaintiff worked 11 hours on a Saturday those hours were worked between 7 p. m. Saturday and 8 a. m. Sunday; wherever it appears that a plaintiff worked 11 hours on any holiday those hours were worked between 7 p. m. on the particular holiday and 8 a. m. the following day", subject to a single instance which Mr. Taylor would like to mention.

Mr. Taylor: It appears I think that the exception is limited to the plaintiff Tony Fleetwood who on August 15, 1948, worked from 8 a. m. to 12 noon and from 1 p. m. to 8 p. m., making up the 11 hours in that particular day.

The Court: Are you perfectly willing to add that?

Mr. Goldwater? Why yes, of course. Mr. Taylor has said that is the fact, and of course if it is we accept his statement that that is so.

The Court: I suppose that you type out that addition and actually physically annex it to the exhibit or else I might lose it.

Mr. Goldwater: All right.

Mr. Tayler: Your Honor will have in mind I am sure that the exhibit which we have now enlarged is the one relating to the employment and payment provisions of the Huron Stevedoring Company but is limited to the 10 selected—

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Colloquy.

The Court: I understand that. Only the specified plaintiffs now on trial in this severed lawsuit.

Mr. Goldwater: That is correct.

Mr. Taylor: That is correct.

The Court: I would assume that no such generalization could be universally made.

Mr. Goldwater: I don't think that your Honor can assume that it would or would not.

The Court: I say, I make no assumption.

Mr. Goldwater: Making no assumption, your Honor, is quite different than assuming that no generalization—

The Court: I meant that I could make no assumption that such a generalization would apply universally. Besides, I am not trying any other cases except these ten.

Mr. Goldwater: We will prepare in accordance with your Honor's suggestion—you said we should prepare that physically with the exception in it and then attach it to the exhibit.

Mr. Taylor: There is one other small matter before I call the next witness.

Mr. Goldwater wanted to know whether the testimony of Mr. Iglehart turned out to be correct. We find that in that particular it was incorrect. The correct statement is that Huron paid men at the rate of \$1.25 an hour for work on a Saturday morning if preceded by night work and no day work.

The Court: Conforming to the testimony given by the other witnesses.

Mr. Taylor: That is right: They paid the overtime rate for work on Saturday morning only when preceded by 40 straight time hours in the same week.

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Mr. Goldwater: By straight time hours you mean day work?

The Court: That is right.

Mr. Taylor: That is right.

DONALD R. HORN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor;

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- Q. Mr. Horn, where do you live? A. 208 North Trenton, Arlington, Virginia.
- Q. What do you do? A. I am a labor economist with the Maritime Commission, Labor Research Section.
- Q. What has been your training and experience in that field? A. My training has been—
- Q. Include in your answer if you will, please, also your education. A. Economics, major, at Northwestern University, and labor economic research work University of Chicago; and three years of government labor economic research work.

Q. Where specifically are you now employed? A. With the Labor Research Section, Maritime Commission.

Q. Who is Dr. Reed who is sitting here with you in the courtroom? A. Dr. Reed is the chief of the Labor Research Section and I am his assistant.

Q. You and Dr. Reed and Mrs. Schleifer and I had some meetings, did we not, with reference to whether it would be possible to prepare and present to the Court statistical studies with respect to straight time work and overtime work of longshoremen in the Port of New York covering the period of the war years, did we not? A. Yes.

Q. What sources of information were available to you for the purpose of making such a study?

Mr. Goldwater: If your Honor please, I would like to make my objection now perhaps to what appears to be the whole line of examination developing, although I can wait until it further develops.

The Court: I don't know where this is leading to. If you want to do it now, go ahead. Maybe you

are anticipating. What, I don't know.

Mr. Goldwater: Well, obviously this witness is being questioned about the sources of information which led to the preparation of the exhibits in evidence.

The Court: Already in evidence?

Mr. Goldwater: Studies.

Mr. Taylor: No.

Mr. Goldwater: No!

Mr. Taylor: Not at all.

Mr. Goldwater: Then I am so sir. I am anticipating.

Mr. Taylor: I suppose I am not making it clear. I have here in my hand another statistical chart of which a copy has been supplied to Mr. Goldwater which is entitled "Statistical analysis of work hours of longshoremen in the port of New York for two-week periods in the second, third and fourth quarters of 1944 and the first quarter of 1945." And to it there is attached a stipulation signed by both parties to the effect that the plaintiffs would not object to the table on the basis of the best evidence rule or the rule against hearsay evidence.

The Court: In other words, they will not object on the ground of competence?

Mr. Goldwater: Yes, of course.

The Court: You will object only on the ground of relevance and materiality?

Mr. Goldwater: That is right.

Mr. Taylor: And I think that with respect to this one, unlike the others, they have not conceded. the accuracy of the figures.

Mr. Goldwater. That is right.

The Court: You want testimony on that.

Mr. Goldwater: Yes.

Mr. Taylor: Yes.

Mr. Goldwater: If it is admissible as relevant and material at all then I certainly want testimony on accuracy.

The Court: All right.

Mr. Taylor: We wanted it because of the fact that they are studies—one of them was an historical study from 1923 to 1927, another one for the first ten months after F. L. S. A. up to the instance of the war; and we knew that a lot of attention would be taken in the trial, as it has been, to conditions in the port during wartime, so we wanted to get and present to your Honor as complete a picture as we can. And of course the percentages of work here, as you already know they would be inevitably, are much higher than they were in the other chart. Argumentatively they are not in our favor, but we are giving it to you because we want you to have the whole story.

Mr. Goldwater: I still would preserve my right to object, in spite of the grand concession which Mr. Taylor has made. Because I must be consistent, your Honor. We objected to the tables that were introduced before.

Mr. Taylor: It is clear as to what I am trying to get at.

Q. Mr. Horn, what material did you and Dr. Reed have available to you for the purpose of trying to compile the information on this page? A. We had invoices which the War Shipping Administration received from all the stevedores on Warshipsteve contracts. They were the basic source of information that we compiled into that table.

By the Court:

Q. And these were copies of invoices submitted by whom to whom? A. They were invoices of the stevedores, invoices to War Shipping Administration.

Q. For services rendered? A. For services rendered

and for fiscal control.

Q. In other words that was the basis upon which the stevedores got paid by the War Shipping Administration!

A. That is right.

Q. Now, War Shipping Administration handled what per cent, if you know, of the vessels in this port? A. Under Warshipsteve contracts War Shipping Administration in the port of New York handled up to 70 per cent.

Q. "Up to" is a very long range. A. Well, say approximately then; the other per cent is going into Army and Navy and a small amount of foreign account steve

dores.

Q. What I meant was "up to 70" means from 0 to 70. That would not leave me any basis for inference. A. I meant approximately.

Q. Approximately how much? A. Approximately 70 per

cent. The Cour

The Court: Approximately 70 per cent. All right, go ahead.

By Mr. Taylor:

Q. Did we have some discussion as to the extent of your investigation, that is, whether it should cover a certain

calendar period or certain selected periods within what might roughly be called the war years?

Mr. Goldwater: I object to that on the ground that the conversations which they had or discussions which they had are not material.

The Court: It is quite immaterial.

Q. Tell us in your own way what periods are covered in this study and on what basis or principle they were selected. A. The period selected for the study was the last full year of war experience before V-E Day, and that also was a period of high man-hours worked in stevedoring.

Q. Did we decide that we wanted to have a period-

The Court: Never mind what "we decided". What did they do?

Mr. Taylor: All right.

Q. Did you select a period which had in it the highest volume of cargo movements in the port?

Mr. Goldwater: Now I must object, if your Honor please, to this question that is as indicative of the answer as this. It is far from leading. It goes way beyond.

The Court: Yes. I dare say it is leading. Tell us on what basis you made the selection.

This man is a trained citizen.

Mr. Goldwater: I think he should know.

Mr. Taylor: I will get it sooner or later.

Mr. Goldwater: I know you will.

The Court: He has been qualified to a certain degree of expertness. He is labelled a professional economist. He ought to be able to tell us, without

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counsel leading him, just what prompted him to make the selection that he did.

In other words, what you are being asked is to

justify your sample. -

The Witness: All right. First of all the decision as to why to select a particular sample period. The particular sample period I selected here was the last full year of war experience because during that time the most cargo was loaded and presumably when most cargo was loaded that means the highest number of man-hours worked in stevedoring. And the records we have available are manhours as such indicate also that the fourth quarter of 1944 was the peak of man-hours, stevedoring man-hours worked in the port of New York, and that then was included in the sample. And we took a full year rather than one quarter so as to eliminate any questions on seasonal variations. So we have the second, third and fourth quarters of 1944 and the first quarter of 1945 which gives us the last full year before V-E Day of stevedoring operations in the port of New York, and it includes the period or the quarter with the peak man-hours worked in stevedoring in the port of New York.

The Court: All right. Put your next question.

Q. What portion of that year did you compile figures for? The whole year or some portion of it? A. The total number of man-hours worked was such a tremendous job we decided to take a sample of them. And, normally a per cent sample when items run into millions is considered adequate. But we took over 20, in fact a 23 per cent sample by taking—percentage sample of all man-hours—by taking all the man-hours worked in the middle two weeks of each of the four quarters. So our sampling them is from the 9th to the 22nd of each of the middle months of the four quarters.

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The Court: So, in other words, you have records for eight weeks?

The Witness: Eight weeks.

Q. What were the total number of man-hours in that year, approximately? A. Approximately 19 million.

Q. And the total number of man-hours covered by your

study here? A. A little more than 4,300,000.

Q. Are you prepared as a statistician and an economist to say whether that would be regarded among men in that profession as an adequate sample; would statisticians so regard it! A. Yes. In the Department of Labor they use 5 per cent samples normally.

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By the Court:

Q. You realize that your sample here is manifestly loaded in one direction or another. I don't know which way. But you have 8 weeks out of 52 which is less than 23 per cent and we have 23 per cent of man-hairs. So your table must for some reason be loaded in one direction.

Mr. Taylor: What is the answer to that, Mr. Horn? Did you get the observation! Did you understand the criticism?

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A. Well, about 8—about 16 per cent of the total time is the idea, and that came out to be 23 per cent of the total man-hours?

Mr. Taylor: Yes.

Q. I get it closer; to about 15 per cent of the time; isn't it? 8 into 52—

The Court: 52 into 8 is the way he figures.

The Witness: What is the question?

Q. You realize that your sample did not work out, it must be loaded in one direction or another, because it shows that for about 15 per cent of the time you got 23 per cent of the man-hours, isn't that so? If you had a carload of cans of tomatoes and you took out 10 per cent of the cans and you had 20 per cent of the weight, you wouldn't regard that as a sample of the cargo of tomatoes, is that right, assuming that all the cans were supposed to be uniform in size A. (No answer.)

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By Mr. Taylor:

Q. Let me see if I get this. You have got 8 weeks selected out of a period of a year? A. That is right.

Q. Have I confused this thing by putting the wrong label on any of these figures? What is the 19 million man-hours? What are they? A. The 19 million manhours were for general cargo operations in the Port of New York under-Warshipsteve contracts.

Q. For what period? A. That is for the second, third, fourth, and first quarters. Let's see if I added these up

right. 19 million-

The Court: Have you got 8 weeks?

Q. What is the answer? I did not hear what you said A. It could be that this 19 million figure is just for general cargo, while the man-hours we have covers all types of cargo.

The Court: Then we ought to know. Can you tell us what is the fact?

Q. Let us get at it. What is that paper you have there in front of you, please? A. This is for general cargo. This chart has to do with general cargo.

Q. What do you mean by general cargo! Is there any distinction implicit in the use of that word between that kind of cargo and any other kind of cargo! A. Yes. In addition to general cargo there is lumber which is separated out and there are cargoes such as coal and other cargoes which are bulk cargoes, and then there may be other—

The Court: How about wet cargo? The Witness: And wet cargo.

Q. This is entitled "Man-hours of longshoremen in the port of New York 1944 and 1945." A. That is right.

Q. And you have made up a graph here by quarters and by thousands on your vertical coordinate. A. That is

right.

Q. From what source did you get the information which is graphically represented on that chart? A. The War Shipping Administration analysis of cost of stevedoring operations, loadings and discharges, general cargo.

Q. Will you simplify that a little bit as to what it shows? A. Well, the War Shipping Administration has made quarterly summaries of the general cargo operations

under Warshipsteve contracts.

Mr. Goldwater Will you explain fully what Warshipsteve means? You will have "warship" on the record.

The Court: That word has been used in this courthouse so many times in the last three years—

Mr. Goldwater: Your Henor is thoroughly familiar with it, but the record does not show that it has been used in the courthouse so much.

Mr. Taylor: That is a stevedoring contract with the War Shipping Administration.

Mr. Goldwater: That is what I would like to have stated. I do not object to its being used in

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this trial at all. It was only to make it clear for the record.

The Witness: So, this 19 million man-hours-

Q. Wait a minute. We have not got to that yet. Has this chart here any function at all? Is that to enable you and Dr. Reed to determine as near as you can the period during the war years when the maximum amount of cargo moved out of the port of New York! Is that what you have it for? A. The purpose of this chart was to determine what quarter or quarters had the largest number of man-hours of stevedoring operations in the port of New York. And we found in a preliminary way by looking at the general cargo summary figures that in the fourth quarter of 1944 peak operations were in effect for general cargo.

Q. And it was on the strength of that, whether it was the best procedure or not, that you decided under the instructions from Mrs. Schleifer and myself that in compiling the data which is on this large tabulation you would include the fourth quarter of the year 1944? A. That is

right.

Q. And then would take samplings of two weeks out of each quarter backward and forward from that peak quarter; is that right? A. That is right.

Q. And you did not go beyond the first quarter in 1945 because you thought—there is some relation to V-E Day or the tapering off of the war or something of that sort! A. After V-E Day you would not have war experience or total war experience, and the period-the complete year before that included the peak period.

Q. So, having found the peak quarter you then took two weeks out of the succeeding quarter and two weeks out of each of the preceding quarters; is that right? A. That is right.

Q. And those are the periods covered by this study, for whatever they are worth?

The Court: How many man-hours are embraced in those eight weeks?

The Witness: In the eight weeks we made a count of 4,300,000 man-hours.

The Court: You don't really know, therefore, the exact man-hours for the entire 52 weeks period? The Witness: No; we didn't count all of the man-hours for the 52 weeks. We counted just the sample of 8 weeks.

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Q. How many New York stevedoring concerns had Warshipsteve contracts whose figures for the weeks in question are incorporated into this report? A. There were 47 New York companies which had stevedoring work during the sample periods, and all of their work during the sample periods is included in that particular summary.

Q. Now, the basic information for those selected weeks for those companies was obtained from what type of re-

port, document or material?

The Court: He told us. An invoice.

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Q. Did I cover that sufficiently! A. Yes.

The Court: Yes.

- Q. Do those invoices give the number of men employed at each hatch at the starting time and finishing time?
 A. Yes.
- Q. Will you tell us how you went about it, from that source material, to compile this chart?

Mr. Taylor: Unless you want to waive accuracy, I assume I have to go into it.

The Court: You are not going to object on the ground that those invoices are not here?

Mr. Goldwater: Oh. no.—That is the purpose of my stipulation. As your Honor put it before, we are not objecting to the competency of the testimony.

The Court: All right,

A. The man-hours and instances from each invoice was listed on a work sheet and then summarized by quarters and then annually, and this sheet then is the summary of the additions of the man-hours that were listed under each of the appropriate columns. The columns are: No. 1, total number of man-hours worked; is that right? A. Yes.

Q. 2, total number of straight time man-hours worked; No. 4 total number of overtime man-hours worked—

The Court: We will all agree that by "overtime" you mean overtime as defined in I. L. A. agreement but not any other agreement that they might have!

Mr. Taylor: Yes; I was just going to ask himthat.

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Q. (Continuing)—total overtime man-hours worked Saturday afternoon, Sundays, holidays; total humber of overtime man-hours and number of instances involved between 5 p. m. and 8 a. m. exclusive of Sundays and holidays; total number of man-hours and number of instances of work after 5 p. m.—am I interpreting that right! A. Yes.

Q. Between 5 p. m. and 8 a. m. for men who had worked no straight time hours during the same day.

Mr. Horn, you have brought here at my request, have you not, your work sheets and samples of the original source material? A. Yes.

Q. Did you yourself supervise, have direct charge of all of that transcription of information from the original

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source material to the work sheets, to the chart, through the calculating machines for the burpose of percentages and so forth. A. I had several assistants taking the information off the invoices, and I directly supervised all of the work that was done in getting the information into summarized form that could be used here, from the invoices, through the work sheets and to the final summary.

The Court: We will suspend at this point.

(Short recess.)

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Mr. Goldwater: . May we come up and speak to your Honor?

The Court: Come up.

(Conference at the bench between Court and counsel.)

Q. Mr. Horn, have you an opinion as to whether or not this statistical chart accurately records the information which it purports to record, as stated in the source material from which you worked? A. I believe it is as accurate as any statistical material can possibly be.

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Mr. Taylor: I offer it.

Mr. Goldwater: Now if your Honor please, I object to its admissibility in evidence, on grounds which appear on its face. In the first place, from the standpoint of its relevancy and materiality generally I say it has no relationship to the issues which are before the Court on the pleadings in this case.

Next, I say that the chart is of no probative value, since it covers a two weeks period in each quarter for one year, whereas the case before your Honor

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covers the period not only of that one year which is involved in the chart which is offered, but of two previous years.

I point third to the fact that the exhibit covers 47 companies unidentified, and I assume that Mr. Taylor will say, as he has said with respect to other exhibits, that he will not identify the companies, and I assume for the purposes of this objection your Honor would not require a disclosure of the companies, and therefore no proper cross-examination can be made with respect to the exhibit.

I say, further, that it is valueless from the standpoint of comparison with other exhibits which your Honor has admitted in evidence, since it includes 47 companies and the other exhibits include 17 companies.

I say, further, that it is valueless and inadmissible because with relation to the exhibits which your Honor has admitted-Exhibits D and E-of the 17 companies there named three companies are omitted, if the symbols are intended to be indicative of identical companies in the exhibit which is now offered. It further appears that it has no comparative value, because of the fact that in this exhibit now offered there have been omitted the columns from 12 to 23, inclusive, which columns have reference to the number of overtime hours worked after daytime hours of 8 to 6, 6 to 4, 4 to 2, 2 to 0, showing in columns 13 to 23, inclusive, not only the actual number of hours but the comparison with the total number of hours worked and the percentages resulting therefrom. I think that that embraces all of the grounds of the objection to this exhibit.

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Mr. Taylor: Before your Honor rules may I ask the witness a question or two further about this?

The Court: To qualify it?

Mro Taylor: Yes.

The Court: Go ahead.

By Mr. Taylor:

Q. Mr. Horn, the first 17 companies on this table which I am trying to get into evidence are the same 17 companies that appear in the other statistical studies in evidence, are they not? A. Yes, they are.

Q. And have the same code designations that they carried on the other studies; is that right? A. That is right.

Q. And with respect to those several instances, the three instances where no information appears on this chart with respect to some one of those 17 companies, what is the reason? A. Those particular companies happened to be working on other than Warshipsteve contracts, namely, Navy contracts or War Department contracts during the period we were interested in.

Q. You didn't pick the period for that reason, but for 711 the reason you have already told us? A. That is why

there is no figure for those companies.

Q. With respect to the omission on this study of the breakdown which occurs in the others in each of which you had recorded the number of instances and the number of man hours involved in the case of men who worked 6 to 8, 4 to 6, 2 to 4 and so on, and then continued on into the night, why was that information omitted from this study?

Mr. Goldwater: I object on the ground that the reason for its omission is not important to the inquiry.

The Court: I will let him answer, because it might show a ground other than bias. I will let him answer, to exclude that possibility.

Mr. Taylor: That is all I am offering it for.

By the Court:

Q. What was the reason? A. That kind of breakdown in information was not available to us.

Q. In other words, the invoices did not carry any such breakdown? A. That is right.

Mr. Taylor: Now does your Honor care to hear from me before ruling?

The Court: I don't think so. I will allow it in, for the very limited purposes for which I would use a chart of this kind, and I would use it just for this purpose: if the War Shipping Administration had published a work on the subject of its war experience in connection with stevedoring and the book was on the shelf on the 25th floor, and I wanted to know something about it I would read it, even though it would not be evidence in the strict sense of the word. And of course this is not evidence in the strict sense of the word. Neither the plaintiffs nor the defendants are mentioned in this exhibit. Maybe one of the defendants is mertioned. If so it is purely coincidence. But it does throw a little light upon this segment of economy. Purely in that limited manner I will accept it. If you want it marked in evidence it will be marked in evidence, but it will be treated in the limited fashion that I have indicated.

Mr. Taylor: I hope before we get through I am going to make you think they are better than you have indicated.

The Court: All right.

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By Mr. Taylor:

Q. Mr. Horn, I show you copies of the two photostats which have been marked Defendants' Exhibits G and H for identification?

Mr. Taylor: Have you got those?

Q. What are they Mr. Horn?.

Mr. Goldwater: Has this been marked now as an exhibit

The Court: It should be.

Mr. Goldwater: I would like to have the number and the letter.

The Court: Will you give it to the clerk and he will mark it.

Mr. Taylor: I have given it to him and he has marked it.

Mr. Goldwater: What is the letter? That is all I ask for.

(Marked Defendants' Exhibit J.)

Q. Now what are the exhibits marked G and H for identification? A. Chart G is a summary pie graph,—

Mr. Goldwater: What kind of graph?

The Witness: Pie graph.

The Court: P-i?

The Witness: P-i-e.

A. (Continuing)—showing the percentages of total time which were straight time, Saturday afternoon, Sunday and holiday time, time between 5 p. m. and 8 a. m. worked by men who had previous work on the same day, and time

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between 5 p. m. and 8 a. m. worked by men who had no previous work on the same day.

The Court: And is that a transposition from Defendants' Exhibit J?

The Witness: No. Mr. Goldwater: No.

Q. The period covered is what! A. The period covered is November 1, 1938 to August 1, 1939.

Mr. Goldwater: It is E, your Honor.

The Witness: It is the earlier segment.

The Court: It is a picturization of Exhibit E?

Mr. Taylor: Yes.

The Court: In some aspects of it?

Mr. Taylor:, Yes.

The Witness: Now Exhibit H is an identical chart with identical headings, which show the similar relationships from—

Q. Just admitted† A. From Exhibit J just admitted.

Mr. Taylor: I offer it.

The Court: It is like an accountant's summary of entries in a book. If the book is admissible I suppose the summary is admissible.

Mr. Goldwater: The objections of course are made on grounds that the basis of the picturization is objectionable, and therefore this summary is objectionable.

The Court: I will receive it.

Mr. Taylor: Exhibit G for identification becomes Defendants' Exhibit G in evidence.

The Court: G in evidence.

(Defendants' Exhibits G and H for identification marked in evidence.)

Mr. Taylor: Your witness.

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Cross Examination by Mr. Goldwater;

Q. Mr. Horn, have you brought with you samples of the invoices which you have described as the basis for Exhibit J in evidence? A. Yes, I have.

Q. May I see some of those samples? A. (Hands

papers to counsel.)

Q. You have handed me one sample, and I would like to know what method you have used in determining what samples you would bring with you? A. I more or less took them out of the files, a few from each of several companies.

Q. And what was your method of determining which companies' files you should select these samples from?

A. Well, I think that I just went along and took them out of top drawers.

Q. Did you know what was in the top drawers when you took them out? I mean whose files were in the top

drawers! A. You mean which companies!

Q. That is right? A. Well, it is possible I have a list of the companies whose files I happened to take along with me, and they include some—

Q. That is not important at the moment.

By the Court:

Q. How did the companies get into the top drawers? Was it an index of quality or alphabetical coincidence? A. Alphabetical coincidence.

Q. You don't mean by "top drawers" what an Englishmen means by "top drawers" A. What is that?

man means by "top drawer"? A. What is that?

The Court: Well, we will forget that.

By Mr. Goldwater:

Q. Were they arranged alphabetically? A. Yes.

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Q. And you selected then a company which began with "A"? That happens to be the sample you handed me. A. Well, that is—yes.

Q. Are all the samples you have brought of companies whose names begin with the letter "A"? A. No. There happen to be four and five "As", and six "As", and then it gets into "Bs" and "Cs", and then it drops to "H" and "M".

Q. Then you would say that the selection happened because of the method that you used to follow the alphabetical line? A. Well, it was just chance selection. There was no selection. I just took some.

The Court: Random picking?
The Witness: Random picking.

Q. But this random picking resulted in following the alphabetical line? A. Yes.

Q. Did you bring all of the samples for the company whose sample you just handed me, the American-West African Line, for example? A. No.

Q. How many of these out of how many did you bring! I mean, approximately, Mr. Horn! It is not important to have the number accurate. A. 50 or 60 invoices.

Q. Out of how many! I am trying to get the percentages. A. Well, there were 50 boxes, so big by so big (illustrating).

The Court: Two feet by one foot? The stenographer has a little trouble in transposing the gesture.

The Witness: There were approximately 50 legal sized file drawers full of these.

Q. Well, there would be several thousand? Would that be a fair statement? A. Yes.

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Q. Then you have about 50 out of several thousand?

A. Yes.

Q. Is that a fair sample of each of the companies— A.

No, four or five of each of the companies.

Q. You have a total of approximately 50 out of many thousands? A. Yes.

Mr. Goldwater: I would like to examine this for just a few minutes, your Honor, before we—

(Defendants' Exhibit J marked in evidence.)

Mr. Goldwater: May I have two or three, indiscriminately, to examine at the same time.

Q. Mr. Horn, the samples which you have handed me I assume are fairly typical of all of the invoices which you used in making up this chart? A. Yes, they are.

Q. And was there any great variance in these invoices one from another, or one group from another, which you would like to point out? A. They were all done according to the regulations and the methods laid down under Warshipsteve contracts, and all the regulations were identical for each stevedore.

Q. And they substantially comply with those instructions 729

and regulations, would you say? . A. Yes.

Q. The samples you have handed me would indicate that as part of each invoice there is a schedule supporting it? There was supplied a tabulation showing the hatch where each man or group of men worked—gang worked? A. That is right.

Q. And the specific hours worked by the group, gang

or the individual? A. That is right.

Q. Is that right? A. That is right.

Q. And showing which of those hours were during the daytime and which during the night time? A. That is right.

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Q. By night time I mean hours after 5 p. m. Do you understand it? A. Yes.

Q. The schedule also shows the total of man hours, both on so-called straight time and so-called overtime; is that correct? A. Yes.

Q. Could you, from this schedule which is attached to each one, of these invoices, have prepared what I am told would be called a frequency distribution—that is a statement showing the number of men who worked during the day hours for eight hours, seven hours, six hours, five hours and so on, and similar information with respect to the number of men and number of hours worked after 5 p. m. at night? A. No.

Q. You could not have done that! A. No.

Q. May I refer you to this invoice and ask you whether you understood that the previous questions that I asked with respect to the schedule pertain to this sheet which I now show you and is part of the sample which you showed me, that is the sheet showing the hatch or the description of the place worked? A. That is right.

Q. The number of men who worked at that point and

the hours which the men worked? A. Yes.

Q. Specific hours! I mean the time of day! A. Yes.

Q. And the same information with respect to overtime, where there was overtime, that is time after 5 p. m.! A. It may have been possible to make a selective distribution, that is, by selecting certain of these invoices which show it, in such a way that you could be certain that the men that worked from 8 to 12 in the morning also were the same men that worked night.

Q. Well now, I didn't ask you whether they were the same men that worked at night; I asked you whether you

can show—

Mr. Taylor: Isn't that what you asked?

Donald R. Horn-For Defendants-Cross.

Mr. Goldwater: Oh, no.

Q. I asked whether you could show from this the number of men who worked during the day eight hours, seven hours, six hours, five hours, four hours and so on and the number of men who worked similarly after 5 p. m.? A. Without regard to—

Q. Without regard first as to whether they were the same men, yes. A. Yes, it would have been possible to

make such a count.

Q. Why didn't you make such a count? A. I was not asked to make a count of the number of men who worked at 8 o'clock or who worked at 9 o'clock or 10 o'clock, or the men who worked at 7 o'clock at night or other times. I was asked to make a summary of the number of man hours worked days, straight time, and overtime, and overtime by men who had worked straight time.

Q. Now how could you tell which of these men worked overtime who had worked straight time? A. You can tell by an analysis of the overtime, that any man who worked less than four hours overtime had some straight time

during the day.

By the Court:

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Q. How could you tell that? A. The collective bargaining contract states that if a man is brought to work overtime he must be assured of four hours work. In these cases any man who worked less than four hours work had day work.

Q. Supposing he had more than four hours work, then you couldn't tell? A. If they had more than four hours work they were assumed to be fresh men, if they came

on at seven o'clock.

Q. That is based entirely on assumption? A. Well, here was a choice—

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Q. I don't care whether there was a good reason, but that was in fact an assumption? A. It was done by assumption, and the idea was that if there were some men who worked more than four hours who had worked during the day we would put them on the side that would benefit the other—Mr. Goldwater's claim rather than—

Q. How did you know which side the statistics would

favorf

Mr. Goldwater: I am glad your Honor asked that question. I might not have had the courage to.

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Q. I don't know which side the statistics would favor. You may have some prescience that I haven't got. A. In order to check for sure that making that sort of assumption was reliable, I came to New York and I questioned 16 different stevedoring companies, both bookkeeping departments and their timekeeping departments and their hiring people to find out if when they worked night overtime they worked the same men or other men, if they worked more than four hours, and in every case they said they tried to get fresh men if they could.

Q. All right. Now which column does that deal with!

A. 24.

The Court: Column No. 24.

By Mr. Goldwater:

Q. You relied entirely upon what the bookkeeping department told you; is that right, in making that assumption? A. No; on the collective bargaining contract primarily, and then substantiated by the opinions of other people.

By the Court:

Q. Let me be sure that column 24 is composed of those persons who worked overtime. That consists of

all men who worked more than four hours overtime? A. Yes.

Q. And that is what we really ought to change the caption of that column to read? It is the total number of man hours and number of instances worked by men who worked more than four hours overtime? Isn't that what it really is? Does it mean any more than that? Now you might then translate that into anything you like, but that is what the fact is? Am I correct? A. Yes, that is the fact, but it is also a fact that those men were largely fresh.

Q. As far as you know. But as far as the records from which you drew your statistics are concerned all you can say with assurance, as far as the invoices are concerned, that it is a tabulation of men who worked more than four hours overtime in any one day? A. In any one night.

Q. In any one night? Right? A. That is right.

By Mr. Goldwater:

Q. Now you relied upon the statements which were made to you, as I understand you, with respect to the attempts of the company to get fresh men where they worked nights; is that true! A. That is right. Well—

Q. And you assumed that their attempts to get fresh men were successful? A. No, I assumed that if there was an error in this business of putting some men who worked overtime who had been the same men into this column, that it was not going to be a discrimination against anything that you may want to show. In other words, we show the minimum number of men who had straight-time time during the day who worked on over into overtime. If you take it the other way around, there are no men who worked straight

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Donald R. Horn-For Defendants-Cross.

time—there would be no men who worked overtime and also worked straight time in that count, but there may be in the other count some men—column 24—some men who had straight time. In other words, there may be too many men—too many man hours listed in No. 24, but there is no chance of it being the other way.

Q. Let me ask you, Mr. Horn, had you any information as to the frequency with which fresh men were able to be found to work nights? Did you make any investigation of that of your, own? A. I came to New York and I asked 16 different companies, the people in them, what their experience had been in that regard, and they said that whenever they had a 7 o'clock shift go on—men coming on after the 7 o'clock shape, 6.55 to 7 o'clock shape—that they tried to get and usually did get new men. The older men—the men that worked all day were getting tired.

Q. That was the extent of your investigation of the fact as to the success which they might have had in getting fresh men; is that right? A. That is right. In other words, column 24 may overstate the number of men.

Q. Yes. You have said that before. We understand that.

The question is whether you made any other investiga
tion, except inquiring of these 16 companies? A. No.

The Court: Are you planning to bring this witness back on Monday?

Mr. Goldwater: Am I!

The Court: Yes.

Mr. Goldwater: Oh no. I am not inclined to bring him back.

Mr. Taylor: He is here from Washington.

Mr. Goldwater: If your Honor will give us a few minutes I will finish with him.

(Discussion off the record.)

Q. Let me show you this schedule, Mr. Horn. It appears here that next to the last line shows the time-keeper! A. Yes.

Q. 5 to 71 A. Right.

Q. Two hours overtime? A. Yes.

Q. That is ringed. Does that indicate that he is not included in your study? A. That is right.

Q. He is not included? A. The timekeeper being considered an overhead person by the War Shipping Ad-

ministration in the Warshipsteve contract.

Q. Would this be true, Mr. Horn: If a fresh man worked one night an hour and he quit, or there was no further work for him or he quit, let us say, because he was sick or injured, would he appear in column 24? A. A man that worked actually one hour would have gotten paid for four hours and it would show up as four hours in the invoice. And whether or not he worked one hour or not he would have been billed under Warshipsteve contracts for four hours, three hours appearing in the remarks below as waiting time, or some other reason for not getting—

Q. And how would you know or indicate on your study your treatment of a man who worked for one hour before rain?

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Mr. Taylor: What time of day?

Q. At night.

Mr. Taylor: Coming on fresh at night?

Q. And then knocked off.

The Court: On account of rain?
Mr. Goldwater: Yes.
The Court: Weather.

A. In those cases where they were knocked off on account of rain there was always a remark made on the bottom of the bill some place, and they usually got two hours pay, even though they didn't work, if they showed up and it was raining.

Q. That is why I asked how you treated them if they only got two hours pay and not four hours? A. If they came on at 7 o'clock they would be treated as fresh

men.

By the Court:

· Q. Although they worked less than two hours? A. Less than four hours.

Q. Less than four hours? A. Yes. In other words, when a note was made these men were knocked off because of rain—

Q. You assumed that he would have worked four hours if there were no rain, and you treated him as if he were a four-hour man and therefore a fresh man? A. The contract says they will get two hours pay in case of rain, and each time that happens it is listed in a note.

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By Mr. Goldwater:

Q. The question is did you treat him as the Judge has asked you, as a new man? A. As a man who had no straight time work during the day, and in all cases where there was any doubt that we couldn't decide, if the note was not clear, then this particular man was counted as a fresh man.

Q. I didn't give you back any of these samples, did 1? A. No.

Q. You gave me four? A. I didn't count them.

Q. There are the four back? A. All right, thank you

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Mr. Goldwater: That is all.

The Court: You are excused, sir.

Now can counsel step up for a minute.

(Conference of Court and counsel at the bench.)

The Court: This case is adjourned until Monday at 11.30 a. m. Court is adjourned to 10.30 a. m.

(Adjourned to Monday, June 24, 1946, at 11.30 a.m.)

New York, June 24, 1946; 11:30 o'clock, a. m.

TRIAL RESUMED.

JOHN FRANCIS BARRY, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Barry? A. 757 East 39th Street, Brooklyn.

Q. Where are you employed? A. Bay Ridge Operating 753 Company.

Q. How long have you been employed by the Bay Ridge Operating Company? A. 27 years.

Q. What job do you hold there? A. Payroll clerk.

Q. How long have you been employed by Bay Ridge in connection with payroll work? A. On and off 18 years.

Q. What are your duties with respect to payroll work? A. Compiling figures from the various piers into a master payroll.

Q. We have introduced in evidence in this case, Mr. Barry, some tables relating to straight time and overtime,

John Francis Barry-For Defendants-Cross.

and included in those tables are some figures from Bay Ridge, and it is stated on the two tables which have been marked Exhibits D and E, I think, that so far as concerns Bay Ridge Operating Company their figures will be only July and August of 1939, rather than covering the whole period covered by the chart, which was from the payroll date nearest November 1, 1938, to the payroll period nearest August 31, 1939. Do you know how it happened that the report from Bay Ridge instead of covering that whole period was limited to the months of July and August, 1939!

755 Mr. Goldwater: I obje

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Mr. Goldwater: I object. That is immaterial. The exhibit speaks for itself. As to what period is covered, and why it is not there, is not material.

The Court: It is material on the question as to whether an inference adverse to the defendant might be drawn by failure to call a witness. I will allow it.

A. We had all of our records at that particular time, May, 1941, stored on Pier 4 Bush, Brooklyn. The army came in as the war started, and they took possession of the pier. We transferred all of our records from there to Pier 86, North River, and in transit those particular books were lost and never found.

Cross Examination by Mr. Goldwater:

Q. Mr. Barry, you say the records were first stored in Bay Ridge, on a pier in Bay Ridge in Brooklyn? A. Yes. Q. How were the records put together for storage purposes? A. We had them in regular cardboard containers, filing containers.

Q. Did you have each month in a separate container, or more than one month in one container? A. As much as was allowed in that particular container.

Q. You mean that they were not broken up in containers as to separate months of the year? A. No.

Q. Were there other records besides the 1938-1939 records stored on the dock in Bay Ridge, or the pier? A. Yes.

Q. Were those all lost? A. That I could not say.

Q. Well, all of the months-

The Court: November, 1938, was the beginning month, I think.

Q. All of the months from November 1, 1938, to July, 758 1939, were lost, as I understand you? A. That is right.

Q. And did you say, or do you know whether records prior to that date were also lost? A. I could not say.

Q. Or if records subsequent to August, 1939, were also lost? A. That I could not say.

Q. How do you know these were lost? Did you make a personal search? A. Yes; those were the particular ones we were interested in.

Q. Is what you found the entire months of July and August, beginning with the first day of July and ending with the 31st day of August? A. I could not say the particular date, but it is July and August? What date in July I could not say, the weekend.

Mr. Goldwater: May we know, Mr. Taylor, whether the months of July and August are shown in these two exhibits?

Mr. Taylor: That is what it says. Mr. Goldwater: The full months?

Mr. Taylor: You said yourself that the paper speaks for itself, and you have admitted its accuracy.

Q. Mr. Barry, you said a moment ago that you put as many records in the carton as you could. A. I assume

that, yes, sir. I didn't do the particular filing myself. I am going back a period of eight years now. That is when I had last seen those records on the pier.

Q. You didn't say you assumed that a while ago! A. No, I didn't. I am just thinking of it now. Going back

eight years.

Q. Are you assuming it now— A. Yes, I would.

Q. I don't want to interrupt you. Had you finished your answer, sir? Are you assuming it now because you find that the records are found for the first day of July and ending the 31st day of August?

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Mr. Taylor: I object.

The Court: I will allow it. Is that the basis for your assumption, is the question.

A. Yes. I couldn't say particularly whether they were filed month to month or how they were filed.

Q. Are there any other records of Bay Ridge available from which we could ascertain the work hours of long-shoremen who worked for Bay Ridge between November 1, 1938, and August 31, 1939, except those that are shown on this exhibit for the two months in question? A. Yes, there is.

Q. There are other records available? A. Yes, sir.

Q. What other records are they? A. The time sheets that came from the piers themselves.

Q. You mean that you could have furnished or there are records available from which you could furnish the information with respect to all of the work hours of long shoremen who worked for Bay Ridge between November 1, 1938 and July 1, 1939? A. I believe there is, yes, sir.

Q. Mr. Barry, how long have you been working on these transfers from the timekeeper's report to what you called,

as I understood you, the master payroll?

John Francis Barry-For Defendants-Cross.

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Mr. Taylor: I object.

The Court: I will allow it.

Mr. Taylor: Did the witness go into that? The Court: You asked him that question. Mr. Taylor: I will withdraw my objection.

A. On this particular case or my actual work?
Q. I am talking of the Bay Ridge.

Mr. Taylor: What period?

Mr. Goldwater: I asked him how long he had been working in that employment.

The Witness: I don't quite understand the question.

Q. You said that your employment was transferring data which came from the piers from the payroll reports to the master payroll. A. How long I had been at that particular pier? A. 18 years on and off.

Q. That is what I wanted. A. I didn't know you were

referring to that particular case-

Q. That is quite all right. If you don't understand you say you don't, as you did. Is it a fact or is it not a fact that Bay Ridge make wage-hour adjustments for work over 40 years a week; particularly for Saturday morning work, following 40 hours during daytime work?

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Mr. Taylor: Wait a minute. Is that anything that I went into on my direct?

The Court: No.

Mr. Taylor: I object.

The Court: Objection overruled. The only thing you can say is that he makes him his own witness.

Mr. Taylor: All right.

John Francis Barry-For Defendants-Cross.

The Court: Do you understand the question? The Witness: Yes.

A. Yes, we compensated the men for any time over a

40-hour period straight time.

Q. Can you tell me when the company first began to make that wage-hour adjustment for those Saturday morning hours after 40 hours of day work? A. No, I haven't that particular date.

Q. Can you tell me whether it was in 1939? A. That is my guess it was: I think it was 1938 when we started.

Q. Let me ask you this. I don't want to put words in your mouth. Did you start after the passage of the Wage and Hour Law? A. Oh yes, immediately.

Q. Immediately after that? A. Yes, sir.

Q. Do you know what the work week was for the first

period under the Wage-Hour Law? A. No, sir.

Q. You don't know. You don't know it was 44 hours!
A. I couldn't tell you, no, sir. At that particular time I was employed as a timekeeper on the pier. I was not a payroll clerk.

Q. Oh, well, now— A. Well, I told you on and off, I have worked as a payroll clerk on and off for 18 years.

Q. Mr. Barry, apparently we misunderstood each other. I asked you before how long you had been working in transferring information received from the pier payroll records to the master payroll sheet? A. That is right.

Q. And you said for 18 years? A. On and off.

The Court: On and off he said. This was an "off".

Q. And you were not doing that in 1938? A. No, sir.

Q. You were not doing it in 1939? A. No, sir.

Q. When did you do it? When did you begin to do it? A. I did it in 1920, to 1925, and from about 1940 to

this particular date. In the meantime I have been down on the piers keeping time.

Q. Is the job on the master payroll a higher paid job than the timekeeper's job? A. No, sir.

Q. It is not? A. No. sir.

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Q. Is the job on the piers timekeeping a higher paid job than the master payroll job? A. Yes, it is.

Q./Was it, the timekeeper's job, a higher paid job than-

the master payroll job in 1940? A. Yes, sir.

Q. Notwithstanding that, you went back to the office and did the master payroll job at lower wages than you were getting on the pier? A. That is right.

Q. Do you happen to know, Mr. Barry, what the practice was in New Haven with respect to this Saturday morning overtime? A. I have never worked in New Haven.

Q. You had no experience with the company's records that would indicate to you what the practice was there?

A. No. I have not.

Q. You say that you know that adjustments were made during the period that you worked on the master payroll-beginning sometime in 1940? A. Yes.

Q. When adjustments were made, were they made for the specific week only or was there an adjustment at any time for a retroactive period? A. That I couldn't say. At that particular time I was keeping time on the pier. What occurred in so far as the wage-hour was compiled in the office by the payroll clerks themselves; the timekeepers had nothing to do with it.

Q I ask only of your own knowledge now, and I want to know, when you began making these adjustments in 1940 did you make any adjustments for periods farther back than the current week's work? A. I did not make any af all.

Q. Did the records show adjustments? A. I couldn't tell you. I wasn't in the office, I was on the pier at that particular time.

John Francis Barry-For Defendants-Cross.

Q. In 1940? A. Yes.

The Court: When did you begin working on the master payroll?

The Witness: Very recently. In December, 1944.

Mr. Goldwater: Apparently, your Honor, the witness's testimony is at variance now with what he said before. Perhaps he did not understand the question.

Mr. Taylor: I could not hear the answer.

Mr. Goldwater: He said he began working in 1944 on the master payroll.

The Witness: Back on the payroll. ,I had originally worked before that, too.

Q. Let us get it clear. You worked on the master payroll prior to 1938† A. Yes, sir.

By the Court:

Q. In 1925. A. Yes, sir.

Q. And you worked on the master payroll from 1925 until when? A. I would say about '27, '28.

Q. Then you guit? A. No, sir. I went out on the piers.

Q. You went out on the piers! A. Yes, sir.

Q. When did you go back to the master payroll? A. 1940, in December.

Q. How long did you stay on the- A. Still there, sir.

Q. Now wait a minute. Get yourself collected, sit back and just calm down, and let us get ourselves organized. Let us go over this ground again. Keep your mind on your work. In 1925 you worked on the master payroll, and you worked on the master payroll until about 1927! A. 1928 or 1929.

Q. 1928 or 1929. Then you quit the master payroll work and went out working as timekeeper on the pier! A. Yes, sir.

John Francis Barry-For Defendants-Cross.

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Q. You kept at that work until when? A. Until I would say April, 1943, 1944.

The Court: I give up.

Mr. Goldwater: So do I.

The Witness: It was a period—perhaps I can explain it.

Mr. Goldwater: Go ahead.

The Witness: There was a period of a year that I had a breakdown, a nervous breakdown, and I was home for practically a year.

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By Mr. Goldwater:

- Q. What year was that, Mr. Barry? A. 1943 and 1944.
- Q. Do we understand now that you went back on the master payroll in April 1943? A. No; back on the master payroll in December 1945. '44. 1944.
- Q. Well, during this period when you had the breakdown, Mr. Barry, had you immediately prior to that been working on the pier or on the master payroll? A. On the piers.

Q. So, from 1928 or 1929 until 1944, '45, you never 777 worked on the master payroll again? A. A few days, that would be all. Occasionally I would come in the office if I wasn't busy on the pier.

Q. I will ask you whether you know of your own knowledge at any time from 1938 to 1944 any adustment for Saturday morning overtime under the Wage and Hour Law was made for a prior period, a period other than the current weekly period? A. No, I have no knowledge.

The Court: Any further questions?

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John Francis Barry-For Defendants-Re-direct.

Re-direct Examination by Mr. Taylor:

Q. What were you doing in 1940, Mr. Barryt A. Keeping time.

Q. On the pier? A. Yes, sir.

Q. I think one reason why you were asked so many questions is because you gave one answer in which you said that you went to the office and were working on the master payroll in 1940. Did you mean to say that? A. No, sir, not in 1940.

Q. What were you doing in 1941? A. On the piers.

Q. 19421 A. On the piers.

Q. 1943† A. That was the year I went home sick.

Q. 1944? A. Part of the year I was home sick, in that particular year.

Q. After you got over your sickness you went back to the office? A. Yes, sir.

Q. And you have been there since? A. That is right.

Q. Now, have you ever read the Fair Labor Standards Act! Have you ever read the statute! A. What is that referring to!

The Court: The Wage and Hour Law.

The Witness: Yes, sir.

The Court: You have read the law itself?

The Witness: Well, I have been advised of it; I haven't read it.

Q. Do you know that when it first went into effect the maximum number of hours which the statute permitted employers to work their men without paying overtime was 44 hours? A. Yes, sir, I did know that.

Q. And then it went down to 42 hours? A. That is right.

Q. And finally it went down to 40 hours? A. Yes, sir,

Q. Now you told Mr. Goldwater that the Bay Ridge

Company began allowing the men overtime for Saturday morning immediately the statute went into effect. Did you mean that! A: Well, as I say, Mr. Taylor, it was compiled in the office—

Q. At a time when the statute said you could work 44 hours without paying overtime you didn't make any wage-hour adjustment then, did you? A. No, sir, we did

not.

.Q. Is it true that when the statute brought the number of straight time hours down from 44 to 42 that you then began making adjustments on 42 straight time hours? A. That is right.

Q. When it went down to 40 and ever since then you make the adjustment for hours in excess of 40 straight time hours? A. Yes, sir. We abided distinctly by the

ruling.

Q. When you make the adjustment, Mr. Barry, do you make it in such a manner as will bring the overtime adjustment up to what the contract calls for? Do you understand the question? If you don't say so. A. No, sir, it is not quite-clear.

Q. You know that the straight time pay for general cargo is \$1.25 an hour or was until the present contract—

A. At that particular

Q.—the overtime rate was \$1.87½ an hour, and that the difference between this is 62½ cents an hour; so when you make the adustment for people working on general cargo you make the adjustment in the amount of 62½ cents an hour?

Mr. Goldwater: Lobject to the form of the question.

A. That is right.

The Court: It is leading.

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Mr. Goldwater: You are putting the words in the witness's mouth.

The Court: Yes. I will allow it.

Q. In the case of the men, if you had such men, that had worked 40 straight time hours, then they worked on Saturday morning, but it was a case oil gang handling kerosene, under the contract the straight time rate is \$1.45 and the overtime rate is \$2.17½, a difference of 72½ cents; at what figure did you make that adustment?

A. It will be 721/2 cents.

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Q. You said, Mr. Barry, in answer to one of Mr. Goldwater's questions that notwithstanding the loss of certain payroll records after the Army took over your pier in Brooklyn that there still are in existence records from which you could have gotten information which according to Mr. Walker's letter he said was not available. Is that what you meant to say! A. No, I can't—I know we just caught those two months, those particular time sheets.

The Court: Will counsel come up.

(Conference at the bench between Court and counsel.)

Q. Mr. Barry, will you tell us what kind of records it was that were lost in transit between the piers when the army took over the pier in Brooklyn? A. I know distinctly that the payroll books were lost. I know that because that was what we were originally working from As far as the time sheets were concerned, I am not positive whether they were lost or not, but we had those two months, I know that, that July and August that we made up.

Q. Did you yourself do any work for Bay Ridge in getting together the figures as to total man hours—

straight time man hours, total overtime man hours, and the overtime worked after 5 o'clock, which were reported to us? A. Yes.

Q. When you were getting up those figures did you record that information, so far as it was actually available, from any records of the company? A. Yes.

Q. What did you mean, then, Mr. Barry, when you told Mr. Goldwater that there were records in existence from which that information could be gotten? A. For those two particular months?

Q. No, for the months that you did not -- A. That I

could not say. I do not know where they are.

Q. Do you wish to change your answer, then? A. Yes; I mean what we had given you was all that was available at that particular time when we were looking it up.

Q. You did not want Mr. Goldwater to understand that there were records in existence from which you could have gotten that information, outside of the months of July and August, if you wanted to? A. That is right, they were unavailable. We could not find them.

Re-cross Examination by Mr. Goldwater:

Q. Do you know that the time sheets that you told me were available before were actually lost? A. We could not find them; yes, sir, we could not find them.

Q. You say now you did not understand me when I asked you whether there were other sheets available from which this information could be obtained? A. I thought you meant those sheets you are holding there now.

Q. How did you know what these sheets are? A. I made them up myself from our time sheets. That is, I made up something similar to it in my handwriting. I recognize it.

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John Francis Barry-For Defendants-Re-cross.

Q. Let me ask you whether you identify these three sheets I now show you, which are marked Thursday, March 30, 1944, March 31, 1944, Friday, and March 31, 1944, Friday, and ask you if they are in your handwriting! A. No, they are not in my handwriting.

Q. Can you identify the forms of these sheets, Mr.

Barry! A. Yes, sir.

Q. Are they the forms regularly employed by Bay Ridge in keeping a record of the time worked by the men on the Bay Ridge piers in longshoremen work? A. Yes.

- Q. And what were you doing for the company in March, 1944; what kind of work? A. March, 1944, I was not working. That was the period when I was home sick.
- Q. I show you one other sheet, which is marked— A. March 30th.
- Q. Thursday, 3-30-44. Will you identify that form, or can you identify that form? A. Yes.

Q. What would you call that form? A. Time sheet.

Q. And is that a record, a summary record of the time worked on that day by all men doing longshoremen work for Bay Ridge! A. Not all the men; no, sir.

Q. Which men, or what portion of them? How would

you identify this?

Mr. Taylor: Do you ask him to interpret the document, or testify to some independent information?

Mr. Goldwater: I am asking him to tell me what this sheet, as he is familiar with the records of the company, indicates it is a record of.

Q. Now what is it a record of? A. A record of the men as they worked on the pier at that particular time, but it does not constitute the entire pier. You may get 20 or 30 of these from one pier alone, which would vary

according to your check numbers here, as you notice at the con here, the serial number. Do you see it?

Q. The numbers 1701, 1702, 1703, and so forth. The last digits being in printed numbers, and the first, second or third, as the case may be, being in crayon or ink; are they indicative of the men's tag numbers? A. That is right.

Q. Am I using the right number? A. Check number.

Q. Check number? A. Yes.

In this first column, 1701 has something written opposite it. Can you interpret that, and what does it mean? A. 8 to 12, 1 to 7 a. m., in the morning. 8 o'clock to 12 noon, 1 p. m. to 7 p. m.

Q. In the next column there appears to be an 8 check, and 2; what does that mean? A. Eight hours straight time and two hours overtime.

Q. The rest of that first column, down to the number 1917, appears to be blank; would that indicate that none of the men had the checks from 1702 down to 1750 worked at all? A. They could be working on another sheet, on a different account. As I say, you may get 20 or 30 of these sheets in one day.

Mr. Goldwater: I would like the first three 795 sheets marked, together with those indicating Thursday, March 30th and the two of Friday, March 31, 1944, as one exhibit.

(Marked Plaintiffs' Exhibit 11 for identification.)

Mr. Goldwater: And the single sheet last identified by the witness, dated Thursday, March 30, 1944, I would like to have marked for identification.

(Marked Plaintiffs' Exhibit 12 for identification.)

John Francis Barry-For Defendants-Re-cross.

Q. Mr. Barry, will you look at this photostatic sheet. May I ask you to identify that form, and tell me if you can what it represents? A. It is a payroll sheet.

Q. It is a payroll sheet of Bay Ridge! A. That is

right, yes.

Q. Does this show the number of hours worked by the men whose brass checks are indicated over at the left, in the lefthand column, extreme left, for each of the days of a week beginning with Monday and ending with Sunday! A. That is right, yes.

Q. There is no date on this indicating the week covered!

A. No, there is not; no.

Mr. Goldwater: I ask that it be marked for iden a tification.

(Marked Plaintiffs' Exhibit 13 for Identification.)

Mr. Goldwater: Mr. Taylor says that we may state for the record that, subject to his check, this sheet which is undated. Exhibit 13 for identification, would appear to be the payroll sheet showing payroll for the week including March 30, 1944, of which the time sheet is marked Plaintiffs' Exhibit 11 for identification, for workmen bearing check Nos. 1833 to 1843, inclusive, whose time is also covered by Plaintiffs' Exhibit 11 for identification. In other words, Mr. Taylor wants to check it to be sure this is the same week. There appears to be identity of hours, but there might be identity of hours in another week. That is the point. It is not very likely to be that way, with such a large number of persons employed. However, he would like to check it.

The Court: Very well; I understand.

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John Francis Barry-For Defendants-Re-direct.

Mr. Goldwater: Now if your Honor pleases, I would like to offer in evidence Plaintiffs' Exhibit 11 for identification.

The Court: If there is no objection it will be received.

Mr. Taylor: I would like to know for what purpose it is being offered.

Mr. Goldwater: For the purpose of showing the manner in which the payroll records were being kept by the company.

Mr. Taylor: No objection.

Mr. Goldwater: And the same with respect to Plaintiffs' Exhibits 12 and 13 for identification? The Court: Without objection they will be received.

(Plaintiffs' Exhibits 11, 12 and 13 for identification marked in evidence.)

Q. Is the manner of keeping the records, the time sheet records, and the payroll sheet records of Bay Ridge, similar throughout the period 1943, 1944 and 1945 to the manner which is shown on the exhibits which you have just identified? A. With the exception that they are filed in a book. They are not loose like that.

Q. But the system was exactly the same? A. Yes.

Re-direct Examination by Mr. Taylor:

Q. Mr. Barry-

Mr. Taylor: I wish to call to your Honor's attention that your Honor will of course notice that these are photostats and therefore show nothing at all as to the color of the pencilling or the pen and ink in which entries are made.

The Court: That is correct.

John Francis Barry For Defendants-Re-direct.

Mr. Goldwater: The photostats were furnished by you to us, were they not?

Mr. Taylor; Yes, sure; I furnished you everything that any reasonable person should furnish you with.

Mr. Goldwater: That is in some dispute, but

these exhibits were furnished by you. The Court: Please; this is completely out of

bounds for me.

Mr. Taylor: You knew there was red and black on here perfectly well.

Mr. Goldwater; What!

The Court: Do you want to bring out that there are color differences in the original?

Mr. Taylor: Yes. The Court: Put your guestion.

Q. In making up these sheets, which are called the time sheets, similar to this one which I am showing you and which has been marked Plaintiffs' Exhibit 12, did the timekeepers use different colored crayons! A. That is right.

Q. What color did they use? A. Red and black.

Q. When did they use black and when did they use red! A. Red for overtime, black for straight time.

Q. Where you have an entry, as this one to which I am now pointing, where it reads 8 to 12 in one column, then in the next column to the right 1 to 7, and then in the next column 8 to 2, in what color would the figures 8 to 12 be written? A. In black.

Q. What color would be used for "1"? A. Black.

Q. What color would be used for "7"! A. Red.

Q. What color for "8" A. Black.

Q. What color for "2" 1 A. Yes.

Q. Directing your attention to Exhibit 13, can you tell . us whether or not, on the payroll sheets or book, whatever you call it of which Exhibit 13 is the form, you used different colors of ink? A. We did.

Q. What were the colors? A. Red and black.

Q. When did you use black? A. Black for the straight time work and red for the overtime work.

(Witness excused.)

JULIUS PHILIP BAYER, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Bayer! A. Flushing, Long Island.

Q. What is your business? A. Paymaster, Huron Steve-doring Company and the Grace Line.

Q. How long have you held that position, Mr. Bayer?

A. 28 years.

Q. Tell us a little bit about your work, how many people are under you and what your job is down there? A. I supervise the payment of the payrolls for the Grace Line and the Huron Stevedoring, and we have about 13 or 14 in the department. We make up the payrolls for the longshoremen, the checks and so forth on the docks, and we audit the steamer payrolls.

Q. Are you the head of that department? A. That is

right.

Q. Were you head of the department during the period covered by this suit, which is roughly 1942 to the first part of 1945? A. Yes.

Q. Are you able to tell us what the practice of the Huron Stevedoring Company was with respect to the payment of men, longshoremen who had worked 40 straight

time hours during the week after the date when under the Fair Labor Standards Act the 40-hour week was the maximum amount fixed by the statute? A. We paid them time and a half for the 4 hours above the 40 hours.

Q. You mean if they worked Saturday mornings? A. If

they worked over 40 hours.

Q. If a man had worked 40 straight time hours and then continued to work during the contract straight time hours on Saturday morning, you would pay him time and a half for such time as he put in on Saturday morning? A. That is the practice.

Q. At what rate did you pay him under such circumstances? A. At the rate that he was working on under

the contract.

Q. You paid him the overtime rate stated in the collective bargaining agreement, whichever it might be! A. That is right.

Q. Depending on whether the cargo he was working on— A. If he was working on penalty cargo he received the penalty time.

Q. As stated in the collective bargaining agreement

A. That is right.

Q. And if he was working as a gangwayman or header you made him those allowances also? A. That is right.

Q. Is it true, Mr. Bayer, that the summaries of the employment, showing you a number of photostatic pages which we have marked in this case as Plaintiffs' Exhibit 7, and I want to ask you whether br not, except for the pieces of paper which have been pasted onto these pages, you were in charge of the preparation of those documents! A. Yes, that is right.

Q. It was under your supervision that these summaries were prepared from the original records of the Huron Stevedoring Company! A. That is correct.

Q. And then photostated? A. That is correct.

Q. Now, I have agreed in this case that with respect to these particular ten or more claimants who have brought suit against the Huron Stevedoring Company, that when 11 hours work appears recorded here in the vertime hours of the day, that it is work done at night, whether it occurred on a Saturday, a Sunday or a holiday, and you checked the records at my request to see whether that was true or not? A. Yes.

Q. And found it was true, with the exception of one day with respect to the plaintiff Fleetwood! A. Yes.

.Q. Is that true generally in Huron employment of long-shorement Well, the question evidently is not clear. I will ask it differently.

During the period covered by this suit did the Huron Stevedoring Company employ longshoremen during the day as many as 11 hours? A. Yes.

Q. And during the daytime hours? A. Yes.

Q. Under your practice and according to the terms of the collective bargaining agreement which put holidays and Sundays into the overtime period, is it true that you would enter as overtime work work done by longshoremen on Sundays or holidays regardless of the hours of the diwhen the work was performed! A. That is right.

Q. Is it a fact that during the period 1943 to 1945 or we will say more broadly during the wartime period that Huron and Grace Lines did work longshoremen long hours during the daytime hours on Saturdays and Sundays and holidays? A. Right.

Q. And can I therefore get from you the conclusion, the statement as a fact, that what I have agreed to with respect to these ten selected plaintiffs is not true generally with respect to the Huron Stevedoring Company?

Mr. Goldwater: If your Honor please, I object to the conclusion which the witness draws. If he wants to testify to the fact and it is material812

Julius Philip Bayer-For Defendants-Direct.

The Court: I think you have got as much from him as you can, which is that there were cases in which they worked men_11 hours during daylight hours.

Mr. Goldwater: On Saturdays, Sundays or fiolidays.

The Court: Or on weekdays.

Mr. Goldwater: Yes.

The Court: They could work from 7 to 7 and still work 11 hours.

Mr. Goldwater: Not under the contract.

The Court: That would not make up the point that overtime meant straight time—

Mr. Goldwater: No, because the straight time

The Court: Well, I said he could work 11 hours during the daylight. No question that he could.

Mr. Goldwater: Of course.

The Court: And there were cases where they did.

The Witness: Right. If I may add, I might say that our operation during the war was practically around the clock, day in and day out, except the exception was Saturday nights.

The Court: In other words, you kept the piers as busy as you could?

The Witness: That is right.

The Court: And the men as busy as you could! . The Witness: Yes.

The Court: And your gear as busy as you could! The Witness: Yes.

Q. And you recorded all the time worked by any of your longshoremen on your payroll records. A. That is right.

Q. If it happened to be performed on a Sunday or on a

holiday you would enter it on the pay records, that is, those records which were concerned with the rate of pay you would enter it as overtime work? A. That is right

Q. But on the original time sheets, coming in from the timekeepers on the pier they were by the hours actually

worked? A. That is right.

Q. Including the daytime hours? A. That is right.

Q. You say that they did during the war period work practically around the clock; in other words, worked day-times on Saturdays, Sundays, holidays, as well as the days Monday to Friday? A. That is right.

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The Court: Which days do you define as holi-

The Witness: Well, all the legal-

The Court: Are they defined in the contract?

Mr. Taylor: They are.

Mr. Goldwater: They are. The Court: Never mind then.

Mr. Taylor: Your witness.

Cross Examination by Mr. Goldwater:

Q. Mr. Bayer, his Honor asked you whether it was not possible or whether it was possible that men would work during daylight hours 11 hours apart from Saturdays, Sundays and holidays and your answer was it was possible; is that right! A. That is right.

Q. As a matter of practice, did you start daytime crews at 6 or 7 o'clock in the morning? A. I don't know about

6, but they started them at 7 o'clock.

Q. 8 o'clock is regular starting time, isn't it? A. That is right.

Q. If they worked from 8 until 5 that was the extent of the daylight tour, wasn't it? A. That was the extent of the straight time tour.

Julius Philip Bayer-For Defendants-Cross.

Q. I mean the straight time tour. A. Yes.

Q. That was the shape that got \$1.25? A. That is right.

Q. And all other hours were called overtime hours!

Q. It was your practice, wasn't it, to start your daytime groups or crews or gangs at 8 o'clock in the morning, wasn't it? A. I wouldn't say it was the practice, no.

Q. It wasn't? A. It did occur; but there were lots of times when they worked from 7 o'clock in the morning

to 7 o'clock at night.

Q. What was the regular practice, however, with respect to when the crews came on during the years 1943, 1944 and early 1945? A. You mean by regular practice what they had in the union or what they actually—

The Court: What was the normal thing that you did.

The Witness: Whatever they needed to get ships out. They wanted to work all the hours possible. The Court: Who is "they"?

The Witness: The company and the men both I would say.

any regularity with respect to starting time and stopping time of the men? A. Well, certainly there is some degree of regularity, but I wouldn't say what was what, I couldn't say unless you go into every specific detail and list them.

Q. Then there was no general practice, was there! A.

What do you mean by general practice?

Q. When I asked you before what was the regular practice, wasn't it the regular practice for men to start at 8 o'clock and work until 5 and an hour or two overtimes if they were required? A. Yes, that is right.

Q. That was the regular practice, wasn't it! A. Well, I would say it was regular. You can say it is regular if

you want to. They come at 7 o'clock and start but I would say that—

Q. Was that the normal thing during this period 1943;

Mr. Taylor: Was what normal?
Mr. Goldwater: To come at 7.

The Court: To come at 7 or 8. Which was the more dominant or predominant?

The Witness: I would say probably 8 o'clock was.

Q. You told Mr. Taylor that when the men worked more than 40 hours the 4 hours on Saturday morning was entered up as overtime? A. If it was above the 40 hours; yes,

Q. Above the 40 hours, yes. Now, back in 1939, from October 24, 1939, to October 24, 1940, the Wage and Hour Law limitation was 42 hours, wasn't it? A. Yes.

Q. How did your records show that you entered up overtime there, assuming a Saturday morning work of 4 hours after 8 hours a day for 5 days in the week? A. How do the records show?

Q. Yes. A. Well, it would be an adjustment of two-hours.

Q. Then you would pay 42 hours at straight time? A. That is right.

Q. And the two hours at overtime? A That is right.

Q. Now was this practice in 1939 to 1940 and since 1940 as you have described it, above 40 hours, the same in cases where men worked 5 days a week—I should say 5 nights a week, at 8, 9 or 10 hours a night and then worked a Saturday morning? A. No. They worked at night you say?

Q. Suppose they worked five nights, 8, 9 or 10 hours a night! A. At our overtime rate!

Q. At your overtime rate. That is \$1.871/2 for general

Julius Philip Bayer-For Defendants-Cross.

cargo. And then worked 4 hours on Saturday morning.

A. Straight time:

Q. For Saturday morning! A. That is right.

Q. And between October 24, 1939 and October 24, 1940, 'you would have two hours at straight time in that case on Saturday morning? A. That is right.

Q. And two hours of overtime on Saturday morning!

A. No, there wouldn't be any overtime on Saturday morning.

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The Court: Not if he worked at night all the week before, as I understood.

Q. Let me try to make it clear. I am afraid I have not made it clear. Assuming a man works five nights at 8 hours a night, then he worked on Saturday morning 4 hours between October 24, 1939, and 1940, how would you pay the Saturday morning 4 hours? A. Straight time.

Q. Between October 24, 1939 and October 24, 1940? A. It wouldn't make any difference what time it was.

Mr. Taylor: Mr. Goldwater, can you tell me whether that is the date when it went from 44 to 42 or 42 to 40?

Mr. Goldwater: That is the date I am indicating, the date when the 42 hours were limited, which was October 24, 1939.

Mr. Taylor: You are asking him as to what they did where the men had worked 40 hours at night Mr. Goldwater: Yes.

Mr. Taylor: And no work during the day.
Mr. Goldwater: Yes.

Mr. Taylor: Then on Saturday morning he worked 4 hours, at the time when the statutory limit was 42.

Mr. Goldwater: That is right.

Mr. Taylor: You want to know how he paid the 4 hours.

Mr. Goldwater: Yes.

The Court: His answer was straight time.

The Witness: That is right. Mr. Goldwater: That is right.

The Court: Go ahead with the next question.

Q. Would that be true where he worked 50 hours of night work in the first five nights in the week? A. It would be true no matter how—

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Q. You would pay the same way? A. That is right.

The Court: Any other questions?
Mr. Goldwater: I think that is all.
The Court: You are excused.

(Witness excused.)

CALEB A. SMITH, called as a witness on behalf of the defendants, being duly affirmed, testified as follows:

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Direct Examination by Mr. Taylor:

Q. Where do you live! A. I live in Belmont, Massachusetts.

Q. What do you do! A. I teach economics at Harvard

University.

Q. Tell us about your education and professional training and experience, Mr. Smith, please. A. I was graduated from Haverford College with honors in economics in 1937. I worked for about a year and a half in business. Then I went to Harvard University, doing research

work and studying. After doing research work, which involved accounting and statistical manipulation of figures for about two years I started doing teaching work. The first teaching I did was in accounting. Since then I have been teaching in the fields of corporation finance, industrial organization and labor relations, as well as elementary economics.

The Court: Since when have you been teaching at Harvard?

The Witness: I started teaching at Harvard in 1941.

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Q. What do you teach? A. I teach a course in what we call the concration and its regulation, corporation finance and the regulation of it by such bodies as the SEC. I teach a course in industrial organization in part, that is, the public regulation of business practices under such agencies as the Antitrust Division and Federal Trade Commission. I have taught labor relations in the Harvard University Extension Courses. And teach elementary economics.

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Q. Have you anything further that you would like to add with respect to your qualifications in statistical matters, because you know we are going to ask you about statistical evidence in this case. A. As I indicated a good deal of the research work which I did at Harvard was of a statistical and accounting nature. I studied statistics at Harvard with Professor Crum and Professor Frickey, and participated in a seminar on statistical testing of economic data with Professor Staehle. I have published an article in criticism of statistical procedures used by Professor Yntema of the University of Chicago. The article appeared in the Review of Economic Statistics. It was a criticism of his study of the cost output function of the United States Steel Corporation

which was presented by the Steel Corporation to the contemporary national economic committee.

Q. Have you had employment outside of your professional duties at the University in economic and statistical matters? A. Two years ago I made a study of the profitability of cotton textile firms for the in various sections of the country for the National Association of Cotton Manufacturers in connection with a War Labor Board case.

Q. Now you have, Professor Smith, made or been connected with certain of the statistical investigations which have resulted in the compilation and preparation of certain of the tables and charts which are in evidence in

this case, haven't you! A. Yes.

Shipping Administration contacted me and they asked me among other things to supervise a study with respect to the amount of overtime worked in the point of New York during the 10 months period after the Fair Labor Standards Act had gone into effect and before the war started in Europe, which rather disrupted the general pattern that had prevailed. This study pertained to the amount of overtime worked as a total to the amount worked on Sundays, holidays and Saturday afternoon to the amount of overtime worked by men who had already worked various amounts, of straight time during the particular day on which they worked the overtime.

Q. Tell us how you went about it, how the figures were gotten together. A The War Shipping Administration contacted the New York Shipping Association and through them stevedores in the port of New York, getting from them these figures, such figures as were described in testimony earlier this morning here. These figures were submitted. The questionnaires that we sent out requesting these figures, I participated in drawing those ques-

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tionnaires up. And then after the companies had been working on those figures I went around and talked with the responsible official and in most cases with the person who had actually done the work on compiling those figures from the work sheets that were involved.

Q. Now directing your attention to the two studies which have been marked Exhibits D and E I think which is the ten months—well, let us take them one at a time; the ten-month study so-called. Now, in order that we may avoid any confusion in the record, the table which you now hold in your hand has been marked Exhibit E in the record in this case and we refer to it as the ten-months study. Now that records the figures gotten together in the manner that you have described from 17 different stevedoring companies operating in the port of New York.

I would like to have you tell the Court everything that you can bearing upon the question of whether the figures accurately derived from those 17 companies are a representative sample of the conditions here in this port during the period covered? A. It is my understanding—

Mr. Goldwater: If your Honor please, this witness has not yet been qualified to testify as to what is or is not a representative condition in this port. The witness has a fine economic background and an academic background which has been presented to us; but his experience with shipping in the port of New York is sadly absent from his qualifications. I don't think he is in a position to testify whether this is a fair sampling.

The Court: All he can do is festify whether these figures, taken as against another batch of figures, constitute a fair sample of figures. In other words, his is purely a paper proposition.

You do not claim to have any personal knowledge of conditions in the port?

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The Witness: Only in connection with talking with people in the port.

The Court: That is what I mean. Consequently, you have to qualify the paper as being a fair sample of the paper. That may lead us some place.

Mr. Goldwater: I think that is exactly what It is—a paper is a fair sample of the paper, but it is not a fair sample of the shipping conditions. It may or may not be. I don't know, if your Honor please.

The Court: He will tell us I presume that, making certain adjustments which will have to be established otherwise or which may have already been established otherwise, this is a fair method of getting a sample of the situation. That is what I assume the question is directed to.

Mr. Taylor: Yes.

The Court: I will let him answer it as soon as we resume after the luncheon recess.

Mr. Goldwater: I made a statement; I don't know whether it appears as an objection, your Honor, but I would like it to be understood that my statement was intended to be an objection to the witness testifying in this particular.

The Court: Yes, to that extent; and I overrule the objection.

(Recess to 2.15 p. m.).

Cabeb A. Smith-For Defendants-Direct.

AFTERNOON SESSION.

CALES A. SMITH, resumed the stand.

Direct Examination Resumed by Mr. Taylor:

Q. Professor Smith, won't you be good enough to tell the Court everything that you know of which will be of assistance to him in evaluating these statistical studies!

The Court: That is a broad invitation.

Mr. Taylor: Yes; I made it intentionally so. We are all interested, and you particularly, I am sure, in how much weight and significance you are to give them, and I am sure Professor Smith can tell us things about it which will relate to it.

Q. Won't you go ahead?

Mr. Goldwater: Of course counsel has no respect at all for the rights of opposing counsel, and the rights of the plaintiffs with respect to objections.

The Court: I think what you will have to do is to listen, and move to strike cat.

Mr. Goldwater: I suppose perhaps that is the quickest way to do it, rather than through the formality of examination.

The Court: It will be to the point, because there is a great deal the Professor knows which might be helpful, to me anyway, but I do not think we can afford to get it all into this record.

Mr. Taylor: I do not think it will take very long.

Q. Go ahead, Professor. A. With respect to the selection of these companies, Mr. Lyon of the New York

Shipping Association told me, and as I understand it he has testified here in court, that these companies represented in his opinion companies that did at least 70 per cent of the business of stevedoring, deep sea stevedoring in the port.

The Court: All right, so that is one of the premises that you accepted?

The Witness: Yes, that and also Captain Nolan's similar assurance.

The Court: It does not make any difference from your point of view or from the point of view of this case at this moment how many people assured you. The fact is you took somebody else's statement. You took Mr. Lyon's and Mr. Nolan's statements that this was 70 per cent of the business of the port?

The Witness: That is correct. Then I have also examined a document prepared for this case, showing the amount of work done by all the contractors under the War Shipping Administration for the period 1944-1945.

The Court: That is the chart or table that was prepared here by another witness.

Mr. Taylor: Introduced through the witness Horn, Exhibit J.

Q. Go ahead. A. In that exhibit the companies which comprised the 17 companies in this study with respect to 1939 comprised about 65 per cent of the total stevedoring business done during that period. I noted in looking over that list that the number of companies which are included in that were not in business, or were doing very little business during the period of ten months prior to the start of the war in Europe, so that that corroborates the other statements of Nolan and Lyon.

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Cabeb A. Smith-For Defendants-Direct.

The Court: We are not interested in that.

The Witness: Then with respect to the companies that were not included in this sample, one expects if he has a 70 per cent sample that it is important how that sample was selected. As I understand it, they were selected to be representative of the type of work done in the port, and in talking with all of the companies which presented such material it seemed to me, from the limited knowledge of the conditions in the port that I gained from talking with some 25 stevedoring firms in the port, that they did comprise what would appear to me to be a representative sample, with the possible exception of smaller companies, that some smaller companies were left out. That is, there were some smaller companies introduced, but there were not as many smaller companies introduced as an even proportion of the port would give. . The reason for that was that a lot of the smaller companies are very deficient in their clerical staff. It was hard enough to get these figures. We had to keep going back to these people and urge them to get the figures for us, and so forth, and if we had tried to get them from a lot of the smaller companies it wild have made the task just that much more di dit.

Q. In what way, if any, does the fact that the 17 selected companies includes the larger companies, affect the significance or value of the end result? A. I would expect from the figures that were submitted by most of the smaller companies and from a rather careful search of the type of business that was done by the companies, and the remaining business to be done in the port, that the

smaller companies which were not included did not handle

their proportionate share of passenger ships and other tightly scheduled ships. That would mean, then, that the amount of overtime worked by these smaller companies, as is shown in that study anyway for the companies that are there, would tend to be less than for the 17 companies average, and also the amount of overtime worked by men who had not worked any during the day would in all probability also be less, and in the case of the smaller companies shown that is borne out.

By the Court:

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- Q. Professor Smith, you accepted Exhibit J, which is Mr. Horn's study, as the statistical basis for the number of men who worked overtime after having done daytime work, and the number of overtime men who did overtime without having done any daytime work; is that correct? A. Only for that period.
- Q. For the period involved in that study? A. In his study, yes.
- Q. So that to the extent that there be any deficiency—well, any deficiency in his analysis or in his basic material, that would of course be reflected in your statistical material? A. No, when I was referring to the smaller companies I was referring to the smaller companies included in the study which I directly supervised. In the case of those the amount of overtime, particularly the amount of overtime worked by men who had not worked any during the day, was small.

Q. How did you ascertain in your independent study as to whether a man who had worked overtime had or had not done straight time work during the same day! A. We got the same information from the companies. In fact we got even more complete information.

Q. You mean you got the same kind of information Mr. Horn got? A. Yes.

Cabeb A. Smith-For Defendants-Direct.

Q. And therefore you proceeded on the assumption that wherever there was more than four hours worked, or four hours or more, it was a new man, whereas wherever it was less than four hours additional it was a man who had already worked during the day? A. No. Our material was drawn from the sort of time sheets that were brought into question in court this morning, time sheets which—

Q. Which gave the actual identical individual? A. Yes.

Q. To that extent you were actually able to know whether it was the same man or another man who was doing overtime? A. Yes.

By Mr. Taylor:

Q. I now show you a copy of the table which has been marked as Defendants' Exhibit F, which we referred to as the 40-hour study; that is this one here. Will you tell us, please, what you had to do with that, and anything that you may want to say to his Honor bearing upon the significance of that study! Have you the question in mind with respect to that 40-hour study, Professor Smith! A. With respect to this study, after preparing this study of the amount of overtime worked under the contract, we felt in discussing it that it would be desirable to know how much overtime would be paid to the men if the contract had no overtime provisions whatsoever, and they had relied for fixing overtime simply on the Fair Labor Standards Act. My connection with this study was to lay out what material should be requested from the companies in order to prepare this, and assisted in drafting the instructions that were sent to the companies. We sent them to the same companies that had made up the ten months study, and then after getting that material back from the companies I told the statisticians at the War Shipping Administration how the material should be handled, and made up into a table.

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By the Court:

Q. Look at column 3. That you got from the invoices of the company? A. Payroll or time sheets, yes.

Q. The same kind of material that Horn had? A. No. As I understand his study, his was not drawn from the

payroll.

Q. His was drawn from invoices supplied to the War Shipping Administration. A. Yes. This material was based on the company's going back to their payrolls or time sheets, and the figures in column 3 are the same as 860 the figures in column 4 of Exhibit E, the ten months study.

Q. The same as column 4; yes.

Mr. Taylor: 1,760,288.

The Court: Yes, I see it.

Q. What I am curious to know is whether Exhibit E also involves the same assumption as to who is a new man and who is continuing daytime work. A. No.

Q. That was involved in Horn's analysis. A. There is no assumption. You can tell definitely, because each man had a brass check number.

Q. This is based on actual identification? A. Yes.

Q. So that when you see the number of men who worked more than 40 hours in any work week you actually have the identity of the citizen involved? A. Yes.

The Court: All right.

The Witness: I took that matter up with considerable care with the companies to make certain that if they carried on operations at two places that they established some method for being sure that a man, if he appeared in both payrolls, got consolidated for the purposes of this study.

The Court: All right.

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Cabeb A. Smith-For Defendants-Direct.

By Mr. Taylor:

Q. That is he would have one brass check number on one pier and another brass check number on another pier; you made sure his pay was all thrown together? In other words, speaking in broad terms, is it true that with respect to Exhibit E and Exhibit F and also with respect to the other large tabulations which we call the historical study, the information there recorded was drawn from the original payroll records and time sheets of the companies embraced within the report? A. Yes; from the payroll or time sheets we used.

Q. And you went right back to the original records, And it is true is it not, that in one way or another on perhaps varying forms of documents these companies all recorded with respect to each man according to his brass check number the precise time of starting and stopping work on each day when he worked for them? A. Some of the companies, a good many of the companies did not record the exact time that he started and stopped. A good many of the companies merely recorded the number of hours of straight time and the number of hours of overtime, the number of hours that he worked on any penalty cargo. They did not record the exact time that he started and stopped in all cases. But if he worked 8 hours and it was straight time, it was the only 8 hours that he could possibly have worked. You could tell when it was.

The Court: All right.

Q. The historical study so-called which for the sake of the record I would like to get the correct designation of-

Mr. Goldwater: That is Exhibit D.

Q.—Exhibit D—will you tell us about that anything which would be of assistance to his Honor in evaluating it! A. This study was made from the same sort of records as the ten months study and the 40-hour study. The material was drawn by the New York Shipping Association writing to all of their members and asking them to compile this material for a three months period for each year back of 1938 for which they had the time sheets or the payroll available. A great many of the companies since the statute of limitations had run on the payrolls had destroyed them.

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The Court: I wish I could be as sure of that as you are.

A. (Continuing) Well, that was the reason they gave me for having destroyed the payrolls perhaps I should say. Therefore, there were only a smaller number of companies who were able to furnish this material. For all the companies that could furnish this material we obtained it and collected the material together. A sufficient number of companies were able to supply that material for the years close to 1938, particularly '36 and '37. So that this study gives some assurance that the 10-month period that was selected for this study was not too dissimilar from the general picture for the recent years in the port. It also if there had been any large changes would have revealed what effect if any seemed to be caused in the pattern of port work by the inauguration of the Fair Labor Standards Act.

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The Court: You found the relationships remained fairly constant?

The Witness: They seemed to remain quite constant. The principal thing that seemed to cause

variation over time was the state of general business activity. In 1937 the amount of overtime worked, probably typical, would be a little higher than in 1938. On the other hand, it was much higher in 1938 than the amount of overtime worked in 1933 and 1934.

Q. I notice that the reports are limited to three months periods. Take for example in the year 1936 where you got reports from 11, I think, different companies. 10 different companies. The first one designated by the symbol A-1 was reporting for the months of January, February and March, and that is true of four other companies reporting for 1936. Then the last five have different quarters. Will you explain how that happened and what bearing, if any, it has? A. We left the selection of the quarter up to the officials of the company We asked them to select a quarter of the year that they felt was representative. In the case of companies that had material for a number of years we had them-most of them felt that the best way to do it was to take some sort of pattern. They would start out in one year and take January, February and March, the next year they would take April, May and June, and go on with that sort of pattern unless some sort of disturbance occurred, a strike or anything, that would have thrown the picture out for a particular quarter, in which case they would substitute a different quarter. The attempt was for them to pick out a representative quarter in that year.

And I talked with them about it. I asked the responsible official of each one of these companies to submit an affidavit or deposition with respect to his opinion about the representativeness of those quarters in order that I might be fully assured as to that.

Q. Will you state whether or not the studies which you

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have described were prepared before or after the bringing of the suit now being tried here? A. I am not sure of the date when these suits were commenced. Is my understanding correct that it was in October of last year?

Mr. Taylor: When was it, Mr. Goldwater; do you know?

Q. The suits were brought in October 1945. A. In that case these studies were prepared almost entirely before that date.

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The Court: They were prepared however in anticipation of litigation?

The Witness:. They were prepared in connection with the prospect of litigation in connection with a case in Providence, Rhode Island.

Mr. Taylor: Your witness.

Cross Examination by Mr. Goldwaters

Q. Do you understand that there were substantially the same issues involved in the case in Providence, Rhode Island, as are involved here!. A. Yes.

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Now you have said that you had discussed the preparation of this data with representatives of the company on more than one occasion, as I understood your testimony? A. Yes.

Q. And did the representative of the company know the purpose for which this data was being assembled?

A. Yes.

Q. That is they knew that it was being assembled in connection with the suits pending in Providence, Rhode Island? A. That is right.

Q. I would like to get clear, Professor, before I go intosome more specific things just which of the studies you 875

directly supervised. You used that expression in connection with one of the answers that I am not entirely clear which of the studies you claim to have personally supervised. A. Why, I supervised the studies—the ten months study was the one with which I had the greatest amount, did the greatest amount of work. Exhibit E.

Q. That is what Mr. Taylor has designated as Exhibit

E, that is the ten months study. A. Yes.

Q. All right. A. That one I had the greatest amount of connection with. With the historical study, Exhibit

D, I believe-

Q. D, these two long sheets? A. Yes. With that study I had practically as close a connection as with the ten months study; a little bit less. With Exhibit F my connection was of a more general supervisory nature. I prepared or assisted in preparing the questionnaires that were sent out for Exhibit F and I directed the way in which the material should be compiled. But I did not have as quite as close a contact with the actual compilation of it. The actual compilation of it. The actual compilation and cases was done by the statistical clerks in the War Shipping Administration in Washington.

Q. You had no staff of your own in connection with the compilation of any of these exhibits? A. That is correct

Q. The material that went into these exhibits. A. Any

of the work that I did on it I did directly myself.

Q. Now you say that you assisted in or prepared the questionnaires that went out? A. In the case of Exhibit F I had direct participation in setting up those questions. The questions that were submitted originally, the submissions with respect to Exhibit E and with respect to Exhibit D, those questions were asked piecemeal of the companies. And some of the additional questions that were asked I directly participated in framing those questions in order that we would have adequate material on

which to base the sort of study that I wanted to make. The original questions that were asked were questionnaires and those studies were sent out prior to my connection with the study.

Q. Did you obtain copies of those before you proceeded

with your work? A. Yes.

. Have you copies of the questionnaires? A. I have them some place in the courtroom. It may take me a while to find them.

Mr. Taylor: You have copies, Mr. Goldwater.

Mr. Goldwater: I have some copies. I don't 878 know whether they consist of all the questionnaires that were sent out.

Mr. Taylor: He can very quickly show them

and he can tell you.

Mr. Goldwater: I would like to know from the witness what questionnaires he participated in the preparation of and what other questionnaires he did not, but which he saw before he proceeded with his work.

Q. Would it take very long, Professor, for you to find those? A. Well, I hope not. My recollection is that some time around January of last year a questionnaire 879 was sent out to a few companies in New York; that that was the place that this study started.

Q. May I ask whether the questionnaire which you now have just referred to is one that was sent out after your connection with the work? A. That was before my connection.

Q. Before your connection. All right. A. In addition to this rather jammed briefcase I have here I have two

other collections of material in the back of the courtroom.

The Court: Is this question vital at this moment? I it is not maybe he can find it for you

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during the recess. You might go on with your succeeding questions.

Mr. Goldwater: I will try to go on without it, but I would like to have used it in advance of further cross-examination.

Q. Have you run across in looking through your papers the questionnaires that you assisted in the preparation of after your connection with the work? A. This questionnaire here (indicating) I assisted in the preparation of. This is a questionnaire, or a copy of a questionnaire this is a carbon copy—that was sent out, my recollection is, to the companies, the last companies that were asked for all of this material in one body. You see, the first companies that were asked were asked first to submit the material simply showing the amount of overtime, the amount of the overtime that was worked on Saturday afternoons, Sundays and holidays and, hence, by whatever the amount that was worked at night. Then the breaking of that down into the amount of night overtime worked by men who had worked various amounts of straight time during the day was asked of them separately. This questionnaire here with accompanying instructions was sent out to a group of companies who were asked for all of that material at once.

Q. Do you mean to say then that this material was asked of different numbers of these companies at different times? That is, the same material was asked? A. That is right.

Q. First of some companies and then of other companies? A. In an attempt to get a proper and more general sample at first we had thought that perhaps about half of the port would be a representative enough sample, then it was decided to expand that sample more. There were some companies that we tried to get the information from and their records—it wasn't possible to get it there. So,

new companies were asked to supply this information in order to bring the sample up to the sort of a group that we wanted to have.

Q. You are referring now, are you, to the Exhibits D and E? A. I am referring particularly to Exhibit E. Exhibit D, although in the case of some companies where we by talking with them felt that perhaps they had not searched their records as carefully as they might, we went back to them and urged them to search more carefully to see if they could not supply this historical data. We had to pretty much accept the sayso of the companies as to whether or not they had that material available. So the there was no opportunity to go back to them and get additional material very much. In the case of this ten months study where we hadn't asked all the companies in the first place, it was possible as we came to feel the need for a larger number of companies to continually go out and ask a new group of companies.

Q. That leads me to a question which was not entirely clear it seems to me in Mr. Taylor's direct examination. You were asked whether the data was not drawn from the original records and Mr. Taylor's question comprised these words, "You went right back to original records." Now, you did not have access yourself to any original records, did you, Professor Smith! A. I did not work with those records. In the case of the majority of those companies I saw the records, the work sheets under which they had transferred them, checked the accuracy in the case of entries on a particular payroll onto the sheet to see that they understood what they were doing and that they actually had the records from which they could make up such a report.

Q. In other words, you mean you made what you might call a test check? A. Yes.

? To see whether they were correctly understanding

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what you were directing them to do? A. That is correct.

Q. As to the quarters which were selected on this Exhibit D, this large study, did you say that you left it to the companies to select the quarter which they felt was most representative! A. Yes. We did not feel that, as outsiders, we had any way of knowing what quarter was most representative for their particular stevedoring operations.

Q. Did you make any test check there to see whether the quarters which they selected were actually most representative of their business? A. No. I relied upon their integrity and their—as I mentioned, I asked them to make a sworn statement to the effect that they felt that this was the representative period.

Q. I ask you, Professor Smith, whether any of the instructions given, as you recall them, directed the companies to exclude loading and unloading on coastwise shipping?

A. My recollection is that all coastwise shipping was directed to be excluded from these studies; yes. This was a study of deep sea longshoring.

Q. May I see the one instruction sheet which you did find?

Mr. Goldwater: I will attempt to proceed with something else while my associate looks this over.

The Witness: I have another questionnaire here, if you would like to see it. This is a copy of a letter sent to the Bay Ridge Operating Company. As I understand it, the material in this statistical study has not been identified by companies, with the exception of a few of the companies. I have letters here, but they contain some of the statistical material submitted earlier to a number of the companies. The Bay Ridge, as I understand it, has been identified by those letters. These letters seem to be identical with the letters sent to all of these various companies, reiterating the statistics which

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they submitted in connection with the request in January or February, asking them for further statisties. I might say that one reason why the form may have been different in the case of the Jarka Company from the other companies, is that the accounting authorities of the Jarka Company were especially cooperative in helping us to prepare this material. and we had several conferences with Mr. Sellers, who is the vice-president in charge of their accounting, and, as a consequence, the instructions that were sent to the Jarka Company may have been slightly less detailed or have been compiled in a somewhat different way than those which were sent to the other companies, since we discussed them more intimately with the officials of the Jarka Corporation. I have a copy of that Jarka letter here, too.

Q. Is that the letter of February 24, 1945! A. Yes, addressed to Mr. C. B. Sellers. I would any, except for a form used by the typist, the letters seem to be the same. The break in the page, that probably was the first letter typed. She did not get the breaks in the page as nicely, I suppose, as she did after having a little practice.

Q. That is not quite so, Professor Smith; if you will 891 look at the tabulation across the page in the letter to Sellers you will find that you have four columns. A. Yes, but in most of these letters-perhaps in that Bay Ridge one there are only three. Yes, some of the letters have three and some have four, the difference being that the fourth column is the difference between column 2 and column 3. In some cases the companies had submitted that as a separate figure; other cases they had not submitted it as a separate figure.

Q. Will you say that again, that the fourth column is the difference between 2 and 31 A. No, it is the difference between the total amount of overtime and 3. Two is the total amount of time. It is the difference between 1 and 2. If you subtract 2 from 1, that will give you the amount of overtime hours. If you subtract 3 from that result that will give you the amount of night overtime. That will give you 4.

Q. In other words, the sum of 3 and 4 is the difference

between 1 and 21 A. That is correct.

Q. That is in the Sellers letter? A. That is correct.

Q. And that is not broken down in the letter addressed to the Bay Ridge, which you handed me as a sample of

the instructions given? A. Yes.

Q. Did you issue a letter of instruction with respect to the selection of the representative three months' period, which is the material which appears in Defendants' Exhibit D? A. I do not recall having had any connection with the issuing of any instructions on that. Instructions were issued, I believe, but that was prior to my connection with this. I checked with the companies as to why they selected the three months' period involved, and, having been assured by them orally that they had selected the ones that they considered most representative in accordance with the instructions given them, whether those instructions were oral or written I do not know, and then asked them to make affidavits to that effect.

Q. You directed the studies in connection with the material which is shown on this Exhibit J? A. I am not familiar with Exhibit J.

Q: Mr. Taylor asked you about it! A. Oh, this study! did not direct, no. This was a study that was made and introduced earlier. I said that I had seen that study, that the War Shipping Administration had had that study made, and that those companies listed there are, the War Shipping Administration has told me, all of the War Shipping Administration's contractors in New York.

Q. You said also that those 17 companies comprised

about 65 per cent of all of the business shown of these 47 companies? A. I believe between 60 and 65.

> Mr. Taylor: On that chart? The Witness: On that chart, yes.

Q. In describing this chart you said that it showed all of the work of these companies A. All of their work for the War Shipping Administration is what I meant to say.

Q. Is that so, or does it only show the work for the War Shipping Administration for the second, third and fourth quarters of 1944 and the first quarter of 1945? A. Naturally, for the period that is covered by the study.

Q. Now, did you say that in the preparation of these Exhibits E and F you made no assumptions? A. No as-

sumptions with respect to what?

. Q. Assumptions with respect to whether or not, for example, time worked on Saturday was after 40 hours worked in the day during the week A. It was not necessary to make any assumption with respect to that. No assumption was made with respect to Saturday time. Since you cannot distinguish from the time sheets of many of these companies, in fact most of them, whether the time was worked—at what time any overtime hours were 897 worked-it is necessary to assume that if a man worked four hours straight time on Saturday that that was Saturday morning, and that is certain. You can be sure of that. But then the assumption comes: if he worked four hours of straight time and, in addition, worked four hours of overtime, the assumption was that that four hours of overtime was worked Saturday afternoon.

The Court: And not Saturday morning? And not before time Saturday The Witness: morning? Or not Saturday evening, which is the

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time, one of the most sacrosanct times of the longshoremen to have for themselves in this port for many years.

Q. Is that the only assumption that you made? A. I think that was the only assumption that it was necessary to make.

The Court: He also postulated Euclidian mathematics.

Q. Professor Smith, assume that the companies' records, since you say they did not show the specific hours worked in many instances, showed that a man worked six hours on Saturday; what did you do with that six hours!

A. It would show also what portion of those hours were straight time and overtime. If it showed four hours of straight time and two hours of overtime, we would assume that the two hours' overtime was Saturday afternoon.

Q. Would you assume that whether or not you knew the man had worked previously 40 hours of straight time during the week? A. It would also show on the records as to whether or not he had been given special compensation under the Wage and Hour Law for overtime, so that you could tell whether he was given that overtime because of having worked 40 straight time hours. You could tell that directly from the payroll record.

Q. You could tell that from the payroll record if you saw it. Did you make allowance for that in this assumption that you stated in your letter of instruction, which appears to be undated, but one of those you handed me! I call your attention to this on the second page of the three-page document, which is headed "Special Note", the second paragraph? A. Yes. This says, "It is sumed that the first four hours of overtime shown on

the payroll records for a Saturday are from 1 p.m. to 5 p.m. Since the information asked for in No. 4, that is the total overtime for Sundays, holidays and Saturday afternoons, is overtime after 5 p.m. only, four hours should always be deducted from the number of overtime hours shown for a Saturday before making the entries in columns A, B, C, D and E."

Thus, if six hours' overtime is shown on a Saturday, it should be counted only as two. If on the company's payroll sheets it was obvious from the sheet, either because of any particular entries that there might be; that the assumption was false, they would put the material into the category where it belonged, on the basis of the entries that were there.

By the Court:

Q. If you had an entry showing four hours of overtime on Saturday, you treated it as Saturday afternoon work? A. Yes.

Q. Of course, it is perfectly possible that that work might have been done in the morning, or that the man had already worked two straight hours during the week? A. You could tell that from the records, because it would show up as his having received some overtime compensation for that.

Q. I say, if you have a record showing four hours paid at \$1.875, that is all it will really show? A. No, the companies did not keep their records that way. They showed overtime paid under the Wage and Hour Law separately.

By Mr. Goldwater:

Q. Did Huron show that, Professor Smith! A. It is my recollection that they did, yes.

Q. Did you see some of the Huron time sheets? A. I saw some of the Huron time sheets.

Q. And the payroll records! A. I do not recall that they were different.

Q. And you relied then entirely, did you not, on the company's own interpretation of what you meant by this assumption? The assumption did not clearly indicate what they were to do where their records showed that this overtime was due to the fact that the man had worked previously 40 hours straight in the week; isn't that so? A. I think we assumed that the officials who had charge of compiling this material had some intelligence and some integrity.

Q. I am not talking about integrity, nor am I talking about intelligence. Fam talking about your instructions with respect to the preparation of the material. A. I think they could have been drawn more unequivocally, if that is

what you want me to say.

Q. You cannot tell me now whether or not the company officials, or those who worked on these records in pursuance of these instructions, knew that they were to prepare them with respect to a proper consideration of whether or not a man had previously worked 40 hours before working the four hours on Saturday or six hours on Saturday! A. That is one of the subjects I discussed with them. In the course of discussing with them problems of that sort that would have come out. I feel sure that this had not been done in a vaccum, and done entirely from written instructions. There was a good deal of oral instructions and checking up with them.

The Court: Were there many instances where then worked 40 hours straight time and had not got Saturday morning Wage and Hour time and a half for their four hours on Saturd..., morning?

The Witness: Not a great deal, not

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The Court: Would you say it was rare? The Witness: Rather rare, yes.

Q. Supose a man's record showed that he had worked ten hours on Saturday—

The Court: Straight or overtime pay? -

Q. Overtime pay, all overtime pay. A. The four hours would be regarded as Saturday afternoon and six hours as Saturday night. It would be extremely doubtful whether that would appear on the record, anyway.

Q. Extremely doubtful if what would appear? A. Ten

hours of overtime on Saturday.

The Court: You mean unusual?

The Witness: Unusual.

The Court: That is because of the sacredness of the Saturday night?

The Witness: Yes, sir.

Q. Suppose the record showed eleven hours of overtime on Saturday. A. That was during the war you are having in mind now, I believe.

Q. I am having in mind the period which we are concerned with in this suit, which was 1943, 1944 and 1945. A. I am talking about records for the period ten months prior to the war starting in Europe, when the pressure of work in this port was very different than it was during 1944 and 1945.

Q. You spoke before of your limited knowledge of the industry in the port of New York, Professor. Had you any knowledge of the industry in the port of New York apart from the studies which you made here? A. From talking with people in making these studies, and from reading about the industry. That is my only knowledge of it.

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Q. You mean that you had no occasion to have an interest in this industry prior to your engagement in this case! A. That is correct.

Q. And the people to whom you had access in talking about the industry in the port of New York were whom? A. I talked with officials of the companies, with officials of the union and with officials of the employers association.

· Q. What officials of the union did you talk with? A. I talked with one vice-president, whose name I cannot recall at the moment, and I talked with their secretary and treasurer, whose name I believe is Owens. Is that correct? He was the secretary and treasurer, I know.

Q. I am sure I cannot help you. Mr. Taylor says that is correct, as I understand it.

Mr. Taylor: Well the name is corect. I do not know whether he talked to him or not.

Mr. Goldwater: Oh, I am not asking you to vouch for the witness.

The Witness: The man purported to be Mr. Owens. His secretary introduced him as Mr. Owens.

Q. I think that we still have not a specific answer to the question as to how the overtime was treated when it was eleven hours, as reported by the company's records on Saturday, all overtime. A. It would be treated as four hours in the afternoon, the remainder as night overtime, if any such entry occurred.

> Mr. Goldwater: I would like marked for identification the instruction sheet which the witness has handed me, and from which I have asked the last preceding questions, and from which the witness read the Special Note to which reference was made.

(Marked Plaintiffs' Exhibit 14 for Identification.)

Q. In connection with this Exhibit E, that is this ten months study, there was a breakdown here of the total number of man hours in a number of instances worked by men who already worked six hours straight time during the same day, as to overtime work, and similarly with respect to men who had worked less than six hours and more than four, and similarly with respect to men who worked less than four and more than two, and then as to the group working some but less than two straight time hours during the same day. Did you direct the breakdown into those four categories? A. My recollection is that that breakdown had been used with respect to part of the companies prior to my connection with the formulation of the question.

Q. Was it in connection with the preparation of what material, if you know? A. This material. In obtaining this material from a portion of the companies, say the first ten

of the companies listed here.

Q. Did you accept this breakdown as legitimate and proper in this study! A. I accepted it, and still do, accept this breakdown as a legitimate breakdown. Otherwise I

would have asked that it be changed.

Q. I would assume so. Now you did not differentiate between men who had worked eight straight hours, exactly eight straight hours, prior to their overtime work, and those who worked between six and eight hours, did you? A. That is correct.

Q: And was there a reason for that omission? A. The reason was one of facilitating the preparation of these statistics. You could scarcely ask the companies to list eight hours, 734, seven, six and one-half, six, and so on, right down the line.

Q. Obviously, but when you got to eight hours, eight hours represented what has been called here the normal work day, that is the day one work between 8 in the morning and 5 at night; isn't that so? A. Yes.

Q. You can see the contract here! A. Yes.

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Q. Did you see all of the contracts running way back to 1860, or 1870? A. I have seen a number of contracts dating back, as I recall it, to the 1880s.

Q. It is many many years now since there was a clear recognition of the hours between 8 and 5? A. It does not run eight hours way back there. It was a ten-hour day.

Q. When did it begin with eight hours? A. I do not recall the exact time. I think it was about the time of the first world war.

Q. That is a great many years, anyhow. And since then it has always been described as the straight time day,

hasn't it? A. As the regular working day, yes.

Q. Don't you think there is a difference between the eight hours and seven and three-quarters or six and five eighths. or five and one-half! A. There is a difference, but the difference is not a crucial difference such as the difference between a man having worked two hours of straight time and not having worked any at all. We did not feel that it was justifiable to ask for that separately, because the difference between not having worked any during the regular day and working some during the regular day indicated the difference between a man being hired to start out handling a boat probably that had come into the port but had not docked until late in the afternoon, and then continuing to work that boat in the evening, whereas this business of working seven and a half hours or seven hours would probably arise from a situation in which either the boat docked a little too late for him to start at 8 o'clock in the morning. or that a thunderstorm came up and they had to knock off work for an hour or two during the day, or some cause of that sort interrupting the work. The man was undoub edly employed at the shape at 8 o'clock in the morning That was the only time he would have been available for employment. He was available for employment for the whole day if he had worked six to eight hours, and for all practical purposes—as a matter of fact, that might have

thrown the whole four to eight hours together, without any real damage being done to these statistics.

The Court: What was the significance of breaking down 2 to 4, 4 to 6 and 6 to 8? Why not simply have the two classifications, those who worked during the straight time and then overtime, and those who did not?

The Witness: That would fail to show when a man had only worked half a day. If a man worked half a day, say he was hired at the noon shape, if he was hired then it is a different situation than if he is hired at the morning shape. I think that we might well have had consolidated columns 12 and 15, showing 6 to 8 and 4 to 6, and also columns 18 to 21, none to 2 and 2 to 4, or perhaps it should read "some" to 2 rather than "none to 2". Since that breakdown had already been asked of me I did not see any reason for throwing two together.

Q. Did I understand you to say that you did not ask for the eight hour work and overtime, specifically eight hours and overtime, because there had to be the limitation of the amount of material that you could ask the people to get out? A. Yes.

Q. Did you actually consider the request for those who worked eight hours? A. Exactly.

Q. And then exclude it? A. As I explained before, this form had been sent out to some of the people already. I did not see when I came into the study any reason for requesting a new classification being made there. Any advantage that there might have been in having the exact eight hours did not seem to be great enough to warrant the very considerable amount of work involved in making that new breakdown. It would have involved going back over the sheets entirely again.

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Q. Am I to conclude, from the last portion of your answer that you did consider it and exclude it? A. It was something like a year or a year and a quarter ago, and I do not remember exactly my thought process when I looked over those classifications. It certainly would have been one of the things that would have been likely to have occurred today. If I would have considered it now I should not consider it necessary to ask for that additional information.

Q. Is the best you can say now, Professor, that you cannot remember whether you considered that a year and a half ago or not? A. That is right.

Q. Now, Professor Smith, you say that a large amount of this material had been gathered before you were engaged in connection with these studies; is that right? A. Yes, or was in the process of being gathered, the questionnaires having been sent out.

Q. Now were companies added after you came in or was it a matter of only asking for more material from the same companies? A. Both. Both more material was asked for and companies were added. Primarily, companies were added.

Q. Will you tell us what in statistical work is understood by the term "frequency distribution"? A. Well, in a frequency distribution you take the number of individuals in the universe, as we call it, all the ones that exist. "You have drawn from the universe a number of different, separate individual cases, then you arrange them according to a classification, whatever the particular statistical quantity that you are concerned with, and you break them down into various groups. Say that you want to find a frequency distribution of the number of hours worked by men during straight time. You would note down all the number of men who worked a period of any particular length that you wanted to make it, say 6 to 8 hours; you would note down all the men who were in that particular category. Then

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you would take the number of men who were in the category for the 6 hours and so on. That is the way you make up a frequency.

The Court: How would the result be phrased? In

what type of a figure? A chart, or graph?

The Witness: You would make up a chart showing the number of instances that fall in each one of the classes. Sometimes you make them up, instead of for classes, for individual items. For instance, since I know of no company that breaks it down into less than quarter hours, if I remember rightly the contract provides that the quarter hour is the unit; you could make up a frequency distribution showing the number of men who worked 8 hours, 734, 7 and so on, not for ranges but for just individual items.

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Q. Would you call a frequency distribution of the studies which you made a chart which showed the number of hours worked daily by the employees whose hours were covered?

The Court: Or groups?

A. I don't get your question, I am afraid.

Q. I want to know whether you would call an appropriate frequency distribution here a chart showing the number of hours which were worked daily by all the employees whose hours are covered? A. It would be a frequency distribution. I am not sure what purpose it would serve.

Q. You don't think that would serve any useful purpose here in the study? A. It doesn't occur to me any way it

could be used at the moment.

Q. It would show you the number of hours worked on an average by all employees within a given period for all of these companies, wouldn't it? A. It would show you more than that.

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Q. What more would it show you? A. It would show you the number of men who worked in excess of any particular amount of time that you wanted to know about. If it showed, for instance, the number of men who had worked nine hours or ten hours it would just show you that right off.

Q. It would show that. But one specific thing it would show and that is the number of hours, average hours worked by all the men covered by your studies here, wouldn't it!

wouldn t

The Court: Do you mean by aggregating the individuals and aggregating all the hours and dividing one by the other?

Mr. Goldwater: Yes:

The Witness: Yes. That is what we call a measure of the central tendency of that distribution.

Q. I don't recognize that term, Professor, but I accept it. You did not think that was important or of interest in connection with this study! A. It does not seem to me that a figure on the average number of hours worked by the man in this study would be of any particular significance when you have so much more detailed information about these men.

By the Court:

Q. If one man worked 16 hours and another man worked one hour the average time that they would workor, say the other man worked two hours, to make it easier,
you would have the average time worked of nine hours!
A. That is correct.

Q. But neither of those men worked nine hours! A That is right.

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Q. If you extend that generally you could have an average figure which applied to nobody? A. That is correct.

Q. Would it give you a distorted picture of the industry if you reported that the average work time was nine hours when in fact half worked 16 hours and the other half worked two hours? A. Yes, very decidedly.

Q. Averages are not useful for this type of study, are they! A. They are not as useful as breakdowns such as were prepared here. It would have been very simple to get the new—

Q. Would the median be any more useful? A. I don't believe that a median would be especially useful here. A median is particularly useful when you have one or two very extreme items. For instance, the average wealth of the people in this courtroom would be a certain amount. If Henry Ford were to walk in the average would go up very sharply. The median would remain the same.

By Mr. Goldwater:

Q. I refer you now to your Exhibit E, Professor. Your first of the two columns under the heading 17 shows a figure 11.82 for the total of 17 companies. Now will you tell me what that represents? A. That represents the percentage of overtime work done at night on weekdays, performed by men who had already worked between six and four hours of straight time during the day upon which they performed that night overtime.

By the Court:

Q. Is that 11.82 a weighted average? A. That is a weighted average, yes.

Q. The larger companies had a greater weight than that .

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of the smaller ones? A. That is right. It is obtained by dividing the whole figure for the man hours there in column 15, 149,000, by the figure 1,261,000 over in column 9.

By Mr. Goldwater:

Q. Now in Column 20, the heading 20, the first of the two columns shows a total for the 17 companies of 6.49.

A. Yes.

Q. That is a similar percentage? A. That is a similar percentage for those men who had worked between 4 and 2 straight time hours.

Q. And under the heading 23, the first column has for the total of 17 companies 59/100 of 1 per cent? A. That is right. That is the percentage of their night overtime that was worked by the men who had already worked some time but less than two hours.

Q. Under the heading in 26 you have a figure in the total column of 23.29 per cent? A. That is right.

Q. And that represents what? A. That represents the

proportion of the night overtime worked on week days, performed by men who had not worked any straight time during the day. That is to be contrasted with the figure in column 25 of 4.17 per cent, which is the figure showing the proportion of all of the work done in the port, or done by these 17 companies during this period, that the work done by men who had done no work during the day is.

Q. Now the total of these four groups, the percentages represented in these four groups that you have described, the 6 to 4, 4 to 2, 2 to zero and no work during straight hour time is, as I add them, 42.19 per cent. Can you tell us quickly whether that is approximately right? A. This is the total, starting with 4 to 2?

Q. That is right. 6 to 4—starting with 6 to 4; 11.82, 6:49, 59/100? A. It is about 42 per cent.

Q. 42.19! A. Yes, that seems to be right.

Q. Did you learn, either actually or approximately, how many hours were employed by these men who were included in 12 who worked 6 to 8, who worked six hours, seven hours and eight hours? A. It is the same percentage figure for that. It was 10 per cent of the total night overtime.

Q. That was the total for all who worked six, seven and

eight; is that right? A. Yes.

Q. Do you know what proportion of them worked six and what proportion seven and what proportion eight? A. I haven't the slightest idea. I would assume that a considerable portion of them worked eight hours. The payroll sheets that I looked at very frequently came up with the entry 8 and 2, or 8 and 3, or some such entry as that.

Q. You are relying purely on your recollection as to those payroll sheets now; you have no figures? A. I have

no figures.

Q. You have no work sheets that would indicate that! A. I have no figures, no work sheets that would indicate that. It is merely that my recollection of those payroll sheets is that an entry for a man working seven, seven and a half, six and a half or six hours was much less frequent than an entry for a man working eight hours straight time.

Q. But you can't tell us how much less frequent it was? A. My recollection would be that the number working eight hours would outweigh all of the ones working seven and three-quarters, seven and a half and so on, down to

six.

Q. And the total of those was 10 per cent? A. Yes.

Q. 10.34. A. That is of the night overtime.

Q. Yes. A. No, wait a minute. Excuse me. That 10.34 is the percentage of overtime hours worked by the men

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who had already worked six to eight hours as against the total amount of work done in the port. It is 573 per cent, the figure in column 14 there that is the figure that is comparable to the one we have been discussing for the other periods.

The Court: The 42 per cent?

The Witness: Yes.

The Court: Which complements it to make it

about 100 per cent?

The Witness: To make it 100, yes. That 42.19 and 57.81 make just 100. I think my testimony in reply to a question or two back, perhaps gave an erroneous impression on that. I was looking at the wrong column.

Q. Now taking Deferdants' Exhibit F, that is this year study, can you determine from that exhibit the average number of hours worked per week per man during the period covered? A. I believe so.

Q. How would you determine it? A. Column 1 gives you the total number of man hours worked. Column 2 gives you the total number of men employed. Excuse me; you couldn't do it from this. It would be possible to determine it from the raw statistics which we have, because we asked for these statistics on the basis of week by week. We asked for them week by week in order to be certain that they did not get things confused. But it would serve the purpose of being able to figure out an average number of hours worked if you wanted to.

Q. Then from the basic material you could have determined it, but you can't from this; is that it? A. You could make a pretty close guess, but you couldn't actually determine it, I believe, from these figures. I don't off-hand see any way of doing it. If you examine the statis-

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tics long enough you can work out some manipulation that will produce—give you the answer that you want.

The Court: We are not going to wait that long.

Mr. Taylor: You mean the answer Mr. Goldwater wants.

Mr. Goldwater: No. The answer that the statistician would like to give.

The Witness: No. By the term "manipulation" the statistician means that you have a couple of things that are divided, say, and then again you have one of those items, and you recognize upon examination that if you divide—you take one result and multiply the thing that has been divided into it previously and you will get the original figure back that may be the thing we are looking at at the moment.

Q. Look at column 2 on Exhibit F. The heading is the total number of men employed. The total is 367,271. You don't mean to show by this that there were actually 367,271 different men employed, do you, different individals, separate individuals? A. Yes. Your question refreshes my memory. That figure would show. A man would appear there once for each week that he worked, therefore you could divide column 1 by column 2 and get the result that you wanted to get.

Q. You see, Professor, one of my associates here understood what you meant by "manipulation". I would like to see whether this process of manipulation would develop what I am told to be the fact; that is that the average work week was about 22 hours a week. A. This would show it somewhat lower.

Q. I would like to have you confirm it; if it is lower I would like to have you— A. This figure is somewhat lower than the 20 hours.

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Q. About 19? A. I thin' it would be about 19; yes.

You are now dividing one by 2; The Court: is that what you are doing?

The Witness: Actually, the other way around,

2 by 1.

The Court: How do you divide a small figure by a bigger figure and get a whole number?

The Witness: You get a decimal fraction, and then you move the decimal point over two places, because it is percent. By the nature—

The Court: What I thought he wanted-

The Witness: He wants hours. Excuse me Then you divide 2 by 1.

The Court: 1 by 2 you mean?

The Witness: Divide 1 by 2, that is right. cuse me.

Q. I notice that atothe bottom of your Exhibit E, Professor, you had certain notes, three notes? A. Yes.

Q. Those 25 not appear on Fi do they! A. Well, they

should. They apply as far as F is concerned.

Q. They do apply! In other words, in the case of Bay Ridge, and we are told the figures are for two months only, that would apply with respect to Defendants' Exhibit F as well as E, would it not? A. Yes.

Q. Didn't you think that was important, to show that on this exhibit? A. It certainly should have been shown

on the exhibit.

Q. You knew that Bay Ridge was one of the defendants here, didn't you? A. Not at the time this was drawn

Q. You did not know that? A. Because I didn't know who the defendants were in this case until just about month ago.

Q. Well, you will admit that if a company was a sub-

stantial user of man hours as Bay Ridge is here and appeared for only two months in a year's study, it was important to show that! A. Well, the intimate relation of these two studies I think should guard somewhat against the oversight in not having put those notes on The two studies were designed to be used together as a contrast to each other, and all the figures appear on their surface to be the same for the same items.

Q. Well you never know, do you, Professor, when you prepare studies, how much is going to be used and how much is not going to be used? A. No, I do not.

Q. Isn't it a proper protection or precaution to put on proper reference notes to all portions of the study? A. It would have been advisable to have them included. certainly:

Mr. Goldwater: All right, Professor; thank over you very much.

Mr. Taylor: There is one matter that I wanted to inquire of Professor Smith, that should have been in his direct examination. I would like, your Honor, to finish it.

The Court: All right.

Re-direct Examination by Mr. Taylor:

Q. Professor Smith, did you at the request of the War Shipping Administration make an investigation and study to determine what would be the impact on the stevedoring industry in the United States of a court decision or an Administrative determination that in that industry the legal way of computing pay of longshoremen under the kind of collective bargaining agreement, we have here would be to divide the total weekly pay by the total hours worked and call the quotient the regular

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rate of pay, apply that to 40 hours, and time and a half that amount for the hours worked in excess of 401°

Mr. Goldwater: I object to that as entirely immaterial and irrelevant to the issues.

The Court: Now, Mr. Taylor, you will have to show me authority for justifying that question before I will allow him to answer it, even under Rule 43.

Mr. Taylor: If your Honor please, the only resson I press it is this. We have here a statute which uses very broad, general language. We are justified, within reasonable limits, in assuming that Congress at the time it adopted that language had that degree of knowledge of generally accepted and prevailing conditions in organized industry in the United States which have existed for a long period of time. They of course also knew that conditions would vary from one industry to another in detail You have home workers, you have the embroidery workers, you have people—

The Court: I understood that the Circuit Court sustained a decision which I had a little to do with in which they practically abolished an industry.

Mr. Taylor: Yes. I perhaps prompted it by

The Court: Ergo, it should follow that the mere fact that there is going to be a sharp impact should not have a very great deal to do with the decision.

Mr. Taylor: We are concerned here with the longshore industry. Your Honor has got to decide what the words "regular rate" mean as applied to this industry. And I suggest that it is not unreasonable to urge upon you that a construction

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which would ruin the industry is a construction which the Court should not take unless compelled unavoidably to do so. What does the word mean in this industry! It ought to have a reasonable meaning in this industry.

The Court: The trouble is that what would ruin an industry is one of those things that is a little difficult to determine. I have heard the words "ruin an industry" many times over the last 25 years. Somehow or other some of them don't ruin quite so easily. Their virtue seems to be a little stronger than that.

Mr. Taylor: Yes.

The Court: What you mean really is that it is going to cost a lot of money. Of course I can figure that out very simply myself. If you mean, further, that, assuming nothing else changed, the industry might go into bankruptcy, of course the answer is it never does remain quite the same. Or you may mean that stevedore rates will go up, maybe shipping rates will go up, maybe the postal rates will go up, I don't know. Maybe the dollar will be devalued.

But I think this appeal to impending disaster barring language in a statute which would indicate that that is one of the factors to be taken into consideration, I should think would be inadmissible. I am not aware of anything in this statute which suggests to the Court that the economic consequence to the employer should be given the slightest attention. I am rather impressed with the decisions which indicate that economic consequences to the employer are of no concern, or at least are of concern only to this extent, that the Congress has made a finding that this law will ben-

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efit industry, a finding which the Courts of course are bound to accept. So that the fact that in Case A or Case B any increase will prove very serious, I should not think it material, and I am so persuaded that it is not that I do not even want to let it in under 43.

Mr. Taylor: Well, I would of course not urge upon your Honor that the mere inability of a defendant accused of an illegal act has anything to do with the question of his liability.

The Court: No. I understand you are address-

ing it to Congressional construction.

Mr. Taylor: Yes, I am. And in spite of whatever has been said in the cases which your Honor has in mind, I still with very real sincerity urge upon you that when the courts come, as they inevitably will, from one industry to another, that we should not be too easy to cast aside the accepted practice in an industry. If you have one of these things which has been rigged by a smart lawyer—

The Court: That is a matter of argument, which is perfectly proper, and I haven't any objection to listening to counsel arguing on such propositions. But when you want to introduce evidence, presumably the purport of which will be that this will constitute a burden so great upon this industry that it will languish and die under its assault—well, let us assume that the evidence would thus show. Would that affect the judgment of a court in reading this Congressional language!

Mr. Taylor: Yes.

The Court: Maybe that is what Congress intended, to abolish the longshore industry.

Mr. Taylor: You seriously can't think that.

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The Court: I was told I could not seriously encounter that in connection with the embroidery industry, and the court sustained that view, that that is about what Congress did intend.

Mr. Goldwater: And they did not languish and die.

Mr. Taylor: There were considerations in that case, as I recall it, which were of a practical nature. I mean, the inability to supervise and police the thing otherwise was a very strong reason for that decision. There are no considerations of that character involved here.

The Court: Maybe the longshore industry-1 am now speaking ex cathedra-maybe Congress meant that the longshore industry should be reorganized completely on an orderly basis. I don't know. The mere fact that this is going to be very costly, and that is what your argument will add up to, so costly that the earnings of the stevedoring companies will not be able to absorb such costs—that is what you are going to prove, isn't it!

Mr. Taylor: Yes.

Well that I think is clearly inad- 963 The Court: missible.

Mr. Taylor: For the sake of protecting my rights on the record, do I need make a formal offer of proof, or ask you to receive Professor Smith's testimony as an offer of proof, or can it be done on the assumption that my testimony would be as just stated by your Honor?

The Court: I understand that you are offering to prove through your offering evidence to the effect that victory here for the plaintiffs would, if applied generally to the industry, constitute a burden so

great that the present operating revenues of the stevedoring companies would not be able to absorb it.

Mr. Taylor: Yes. And even more than that-

The Court: I don't say that you have proved it. I say that is what you are offering to prove.

Mr. Taylor: Yes.

Mr. Goldwater: The witness is shaking his head, your Honor, and I think you should observe it, because he indicates negatively that he would not so testify. I don't know what he means.

The Court: An offer of proof is never evidence. I say that is what Mr. Taylor is offering to prove. You offer an objection to that?

Mr. Goldwater: I certainly offer an objection.

The Court: I sustain that objection.

Mr. Taylor: May I enlarge a little bit on this record now what constitutes my offer of proof, to say this: That the subject which I would ask Professor Smith about if permitted to say so, starting with-

The Court: Is it in writing?

Mr. Taylor: It is partly in writing, and in the form of a statistical chart.

The Court: Why don't you have it marked for identification?

Mr. Taylor: The chart would be meaningless without some additional testimony. The result of his investigation, if I correctly understand it, would show that the result of the application of the method of pay calculation which I refer to, that is the average, would result in an increase in the tables of somewhere between 6 and 10 per cent. And we are prepared to show the existing relationship in the industry generally between the total amounts of money which they have paid out for longshore wages durthe period 1939 to 1944 and applying to those figures a percentage increase of from 6 to 10 per centrol

would know how much the liability would be in judgments brought within the statutory period and established on the—

The Court: Retroactively now you are speaking of!

Mr. Taylor: Yes. And the study also includes a tabulation of the net worth of the various companies at the end of 1944, the end of the same period covered by the total payrolls, longshore payrolls.

So that as the material is arranged in this chart, by putting a straight edge across at any particular percentage of the increase you can show how many companies would have against them judgments equal to their entire net worth.

That is what the study is. As to the prospective operation and these horrendous consequences your Honor intimated I was going to undertake to prove, I do not want any misimpression about it. I am not prepared with that sort of testimony. The testimony is only of the kind I have described to your Honor.

The Court: I think—I take it the objection still persists, and my ruling still stands. If you want to offer the table to be marked for identification you may do so, so that a reviewing court might be able to look at it if it chose, to see how grievously I may be in error.

(Marked Defendants' Exhibit K for Identification.)

Mr. Taylor: Mrs. Schleifer asked me whether I should not make an offer of proof. My understanding is that what I have said is being taken as an offer of proof.

The Court: That is correct.

(Witness excused.)

Philip Taft, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where is your home, Professor Taft? A. Providence, Rhode Island.

Q. What is your profession! A. I am a teacher at Brown

University.

Q. Will you tell the Court about your education and experience and qualifications. A. I received my doctor's degree from the University of Wisconsin, I was on the staff of that university. I was employed by the Wisconsin Industrial Commission, by the Social Security Board, and for the last nine years I have been teaching at Brown University. I have also worked for the War Labor Board, and have done some private arbitration.

The Courts What are you teaching!

The Witness: I teach labor economics and social security, although I also teach general economics, but I regard my field of interest the various aspects of labor.

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Q. Have you published articles in that field, Professor

Taft, articles or books! A. Yes.

Q. Tell us about that. A. I am co-author of the "History of Labor of the United States", with Prof. Selig Perlman, covering a period from 1896 to 1932. It is in the "History of Labor" series, edited by Prof. John R. Commons. I am the author of a general labor textbook called "Economics and Problems of Labor." I am co-author in the "Studies of Collective Bargaining", published by the 20th Century Fund. I have also published articles in the American Economic Review, the Quarterly Journal of Economics, the Journal of Political Economy and the Journal

nal of the American Statistical Association and the Political Science Quarterly. Also I have written reviews for The Nation and the Herald-Tribune.

Q. Have you served as arbitrator or otherwise in labor matters? A. Yes, sir; I was a public panel member for the New England Regional War Labor Board, and I was chairman of the Trucking Panel up there, and I have done some private arbitration. I am the permanent arbitrator under the New England Transportation Company contract with the Amalgamated Association of Street and Electric Employees.

Q. Did the word "overtime", Professor Taft, have a generally accepted meaning in American industry prior to the

Fair Labor Standards Act? A. Yes.

Mr. Goldwater: I would like to object, because the suit here is under a statute. The word does not appear in the statute. Whether or not the word had a particular meaning in American industry has no relevancy or materiality here. Specifically, it has no relevance or materiality under the contracts which are in evidence here, as appears from the reading of the contracts and the indiscriminate use of it. It has relevance, according to the testimony of witnesses, in the industry, and the only testimony before your Honor is to the effect that it is used to indicate the difference between the hours 8 a. m. and 5 p. m., and working after those hours, or working meal hours, or working Sundays or holidays or Saturday afternoon and at night.

The Court: I see no prejudice in the question. I will allow it.

Mr. Goldwater: I move to strike out the answer, since the witness answered before I had an opportunity to object.

The Court: Motion denied.

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Q. What is the meaning of the term as used in industry generally throughout the United States prior to the Fair Labor Standards Act?

Mr. Goldwater: I renew the objection on the same grounds with respect to the basic question. The Court: I make the same disposition.

A. The word "overtime" has been both to describe excess time, time to which a penalty was applied, a penalty rate of payment, the purpose being to discourage work at those particular periods.

Q. Was there any distinction in thinking as between hours worked after a preceding period of work and hours worked in one part of the day as distinguished from being worked in another part of the day?

Mr. Goldwater: That is objectionable upon the same grounds, particularly in view of the testimony of previous witnesses as to the practice from time immemorial.

The Court: Objection sustained, because I do not think the question is clear. Let me see if I can frame a question, and if you want to object to it you may.

Is the word "excess time" that you used, we the idea of excessivity an essential element of overtime prior to the Fair Labor Standards Act!

The Witness: No, sir.

Mr. Goldwater: I object.

The Court: Objection overruled.

The Witness: No, sir; overtime, the concept sit appears in American industry, or the practice. I may say, is really made up of two specific ideas one arising in excess of a particular sequence, and the other may be a specific enumeration of hours.

Originally, overtime was regarded as hours in excess of ten or even in excess of 12, or specific hours may be enumerated in a contract of employment.

By the Court:

Q. Let me see if I can understand it. Do I understand that you say that the term "overtime" as commonly used in American industry before October, 1938, meant one of two things: one, it meant time in excess of a stipulated period, or it meant any time, whether in excess or not in excess, which was penalized in any shape or form in the method of payment? A. The two concepts were usually joined together. In other words, you would find or may I say frequently be joined together. You might find that the overtime provisions were defined as hours in excess only. Then you may find, again, that the overtime was

hours.

Q. Did you ever have the second without the first? A. I do not recall it, sir.

defined as hours in excess and also as applicable to specific

Q. So that excessivity was always an element of the overtime? A. Only in the sense that the definition was there. A man could go to work, can go to work now under many contracts in the construction industry or in the printing industry, start at a particular hour and be paid overtime rates, irrespective of whether he had worked—Q. Any prior time? A. Yes.

By Mr. Taylor:

Q. What was the purpose of overtime A. The purpose of overtime is to prevent employment either at a given period or beyond a given number of hours. It is an attempt to impose economic sanctions, or an economic pen-

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alty upon the employer, so as to discourage him from continuing work at either certain periods or after a certain number of hours have been worked.

Q. What is the history of the development of that concept, and how did it come to be accepted, as you say it was accepted?

Mr. Goldwater: I would like to object again, on the grounds which I stated in my objection to the basic question.

The Court: I do not see any prejudice. This might be instructive. I will allow it.

A. Well, the demand for shorter hours by organized labor is one of the first demands that have appeared in our industrial history. Early in the 19th century, and even at the end of the 18th, when labor first organized, the demand for the reduction of hours made its appearance, and several justifications were developed, and those have been, with changes to suit the different times, have been used throughout our history. First it was customary to work very long hours in industry, 12 and 14 hours a day, and we have what is called the citizenship argument, the demand that a free citizen must have leisure time so as to be able to exercise his franchise intelligently. You then have the development of the idea that a reduction in hours will lead to better productivity. Then you have the development of the idea that a reduction of hours is needed to eliminate or id minimize different types of unemployment, maybe technological unemployment. Always the emphasis has been throughout American labor history, I mean throughout our industrial or national history, because unions appeared quite early, the reduction of hours. Thus we had the demands for the ten-hour day, the demands for the nine, for the eight, for the 40-hour week, or rather half Saturday holidays-40-hour week, and now

we even find demands for lower weekly hours than 40 in many industries, in the mining industry, in this clothing industry and others—always limit the hours of labor, reduce them and reduce the hours and allow others to work; but impose a penalty that will discourage work beyond the standard or scheduled hours; and this idea has motivated largely through the feeling, rightly or wrongly—economists would not accept it as correct, but, nevertheless, it has been a driving force throughout our history, that the amount of work is limited, and that some means was necessary to share the work among as large a number of workers as possible.

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Q. Without going into too much detail, can you tell us, with perhaps illustrations, how extensive the recognition and use of this concept was in this country at a time shortly before the adoption of the Fair Labor Standards Act? A. Well, it was fairly general. In labor contracts you will find not only penalty rates, but in some cases absolutely prohibitions, or if you wish to continue beyond the scheduled hours you must get permission for every specific instance. The idea of limiting the work week is one that was prevalent throughout virtually all of our industry, and it is especially evident in those industries that have organized and were operating under a union contract, because the unions have been able to impose their collective bargaining, through collective bargaining, come s limitation of the hours of labor, and have led the way in this respect throughout our history. I could cite examples in the study I made at the request of the War Shipping Administration. Lhave found-well, about 30 ex amples where not only the hours of labor were limited. but also where specific hours were enumerated as overtime hours, in the report of the Industrial Commission, the hearings which were held at the turn of the century and in the examination of labor contracts. I found the same

Philip Taft-For Defendants-Direct.

thing repeated, not as frequently, as an absolute limitation of the number of hours, but with sufficient frequency to establish that that idea of overtime existed.

Q. What was the usual overtime rate? A. The usual overtime rate is—

Mr. Golwater: I object to the question. It seems to me that usual overtime rate—

The Court: Objection sustained. You do not have to argue it. You are now getting into dollars and cents in ratios.

Mr. Taylor: No, sir.

The Court: We will listen to the evidence that there has been a penalty provision, but I think the precise amount of it perhaps exceeds the limits. If you want to indicate those that is as far as I will let you go.

Mr. Taylor: I think the amounts are important, sir. Let me ask a preliminary question.

Q. Can you say from your studies and your knowledge in this field, whether or not there is a generally accepted relationship or probably prevailing relationship between straight time rates and overtime rates?

> The Court: Defore the Wage and Hour Act? Mr. Taylor: Yes, sir.

Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: I will allow it.

A. Yes, sir.

Q. What was it? A. The usual amount is time and a half, though in the older organized industries, and by the older organized industries I mean mainly the printing trades and the building trades, you have time and a half for the

first two or maybe for the first four, and then double time. In other words, an added penalty is imposed if the first penalty is not sufficient to discourage it. Anyone who wants to go beyond a limited amount of overtime will have to pay an added penalty. But that I think is limited to the older organized trades, but time and a half is quite generally in use and certainly in virtually all organized trades.

Q. Can you name a number of industries that occur to you quickly, in which overtime is required to be paid when work is done outside of the normal or usual hours, working hours, of the day! A. Yes; the building trades fairly generally, the printing trades, some of the metal trades, and, may I say, that in the arguments as a panel member of the War Labor Board that this question was always one of contention between the unions and the employer, with the unions—

Mr. Goldwater: Just a moment. What was a matter of contention with the War Labor Board panels is not material.

The Court: No, it is not responsive to the question.

Q. What I wanted you to do was just to name a variety of industries in which this situation exists. A. The building trades, the printing trades, some of the metal trades, and, of course, the longshore industry.

Q. Any others you can remember? A. Not right now. If I consulted my notes I believe I could find others, but those fairly generally and over a long period of time.

Q. Did you say a few moments ago there were some 30 of that character that you knew of? Yes, mainly in the building and printing trades, specific contracts. I have reference to specific contracts rather than industries.

Q. What is the shift differential?

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Mr. Goldwater: I make the same objection as I made to the previous questions.

The Court: I will allow it.

A. A shift differential is a payment for work on either the second or third shift in a plant or an industry where more than one shift is worked.

Q. What is the difference between a shift differential and true overtime?

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Mr. Goldwater: Same objection. The Court: Overruled. Mr. Goldwater: Exception.

A. A shift differential would be an amount large enough to attract the worker for working at less desirable hours, and yet not inhibit work, whereas an overtime work would be a rate designed to inhibit work at the hours mentioned, or after a given number of hours; and I think it can be' recognized by the relationship between the amount paid on the second and third shifts to the amount paid on the first shift. You can recognize whether it is a shift differential or whether it is an overtime rate.

Q. Amplify that a little bit. A. A shift differential is usually a 5 per cent hourly rate, or up to 10 per cent, 5 cents or 10 cents, in some cases a 15-cent differences There is a considerable variation. Seldom would it be more than about 10 cents an hour, or 5 to 10 cents an hour difference between the first and second shifts, and 5, 10 or 15 cents difference between the first and the third shift.

Q. Do you know of any shift differentials as high as 50 per cent? A. I do not.

Q. What is the highest you ever heard of for a shift differential?

Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it. Mr. Goldwater: Exception.

A. The only one that I have known above the amounts that I have enumerated, either 5 per cent or 10 per cent, or 5 to 15 cents, was in the lumber industry, and there a special situation existed. It was due to the difficulty of getting workers in the Pacific Coast lumber industry as a result of the competition of the shippards and the airplane plants.

The Court: That was during the war!

The Witness: Yes.

The Court: What was the shift differential then?

The Witness: 25 per cent.

Q. Do technological considerations and also the volume of business which a particular employer may want to do have anything to do with whether he sets up shifts on a differential basis, as distinguished from whether he has straight time overtime? A. Yes, most of the shift problems have come into existence during the periods of the two wars, and many plants have had to recruit people, that is plants that usually operate on single shifts.

Q. Before we get into the war situation, I wish you would answer my question with reference to normal peacetime operations in this country. A. Will you repeat your

question, please?

Q. Yes. What I am now asking you has to do with peacetime for the moment, not with war time. Now then, in peacetime what effect, whether you have shift differentials or not, do the economical situations and the volume of business of the particular employer have? A. An employer operating on two shifts is able to spread his overhead over a larger number of units, and therefore he is

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enabled to pay his employees a slightly higher rate on the second shift, because of the advantages that a larger volume gives to him, whereas if he is operating overtime that does not take place, the overtime which is too high an amount and that is its purpose. Its purpose is to inhibit him, except under emergency conditions or unusual conditions, from working at those particular times.

Q. Put it this way: in all of your studies do you know of any instance where they have a true shift differential, where it is not necessary to work around the clock or in shifts, either for technological reasons or because of the volume of business with reference to the size of the plant! A. No, sir; no, of course not. Shifts will either be worked in continual process industries, or in industries whose orders are over a period of time and are large enough to employ a second and third shift. Otherwise there would be no point in working and recruiting and training and organizing another shift. You cannot do it otherwise.

Q. Take a continuous operation business like the steel industry; what is the situation there?

Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.

A. It has to work around the clock, otherwise the industry cannot operate, and consequently you have three shifts.

Q. And what ratio of pay as between one shift and another? A. Actually in the big steel case I believe that the difference was 4 cents for the second shift and 6 cents on the third shift. That is, the differential between the first and second shift was 4 cents, and 6 cents between the first and third shifts.

Q Is there any difference with respect to a shift differential as to whether or not the men who work on one

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shift or another are rotated? A. Well, the procedure is to avoid bookkeeping expenses. For the people who work on a shift the shift differential is incorporated in the hourly rates. In other words, if the shift differential were of such nature that by paying each 5 cents extra an hour you would take care of it, and that would eliminate bookkeeping, but you can tell if it is a fact that when a man is doing the same work as a maintenance he will receive several cents less an hour than a man on a rotating shift doing the same job.

Q. I am not sure I follow you.

The Court: I understand. In rotating shift cases the thing is spread out evenly, so that you do not catch it right away as a differential, but it is there.

The Witness: That is correct.

Q. And where you don't rotate your shifts then very naturally you do have a clean-cut difference? A. Yes; you do in both cases, only in order to eliminate the book-keeping problem it is spread evenly around.

Q. You, at the request of the War Shipping Administration, made a particular study of the longshore industry? A. Yes.

Q. Will you tell us what you did and what you were asked to do? A. I was asked to determine whether the night rate was an overtime rate, and I examined union contracts, releases, statements issued by the New York Shipping Association to its members, and summaries of discussions, and also newspaper releases, and I sought to determine from that information whether it is an overtime rate or not.

Q. Did you confine your studies to the port of New York, or was it broader than that? A. It was broader

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than that, but the evidence was largely taken from the port of New York, though I looked over a considerable amount of other information, the minutes of the unions in the industries, and the newspapers issued by the unions in the industries, and the discussions, of course, that went on in a number of government reports on the industries.

Q. Going back for a moment to the matter of shift differentials, and your answer that you had never known one that was more than a certain figure, except that instance in the lumber industry, will you please tell us how extensive your investigation was of shift differentials! A. Well, I believe that I examined several hundred cases in which a shift differential existed. I also examined some of the decisions by the governmental agencies, both in the last war and in this war, governing shift differentials. I examined I think at least 200 instances where shift differentials existed.

Q. When you say "instances" what do you mean? A. I mean a factory or plant or industry, in some cases where a shift differential existed or where a shift differential was ordered by the War Labor Board, some of them covering—well, in one case it covered close to 300,000

1008 workers.

Q. Did you examine all the War Labor Board cases!

A. A very large number of them. I would hate to say all,
but a large number of them.

Q. That means what? A. Several hundred.

Q. Have you come to any conclusion on the problem that was put to you? A. I have come to a conclusion.

Mr. Goldwater: The question is have you come to a conclusion. So that I may make an objection I would like the answer to be yes or no first.

The Witness: Yes.

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Q. Have you an opinion?

The Court: That is the same thing.

Q. As to whether the overtime in the longshore industry in the port of New York is true overtime, or whether it is a shift differential?

The Court: You may say yes or no to that:

A. I have an opinion.

Q. What is your opinion?

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Mr. Goldwater: I object, on the ground that the witness is not qualified to express an opinion which is relevant or material to the issue that is before the Court in the longshoremen's industry; that the case, in accordance with the testimony adduced by witnesses produced by this defendant, is one that is entirely unique; that the president of the union has explained a history with respect to overtime in this industry which is actually and factually at variance with the history as explained by the witness with respect to industry generally; that the variance is so clear and that the evidence is so definite with respect to the casualness of the work in this industry, the witness having not shown that in any industry examined by him there is the same casualness of employment; and that the opinion of this witness under those circumstances has no probative force and has no materiality or relevancy to the issues that your Honor has to decide.

The Court: Very well. All of that goes to the weight. The objection is overruled. What is your opinion?

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The Witness: My opinion is that it is a true overtime rate.

The Court: As industrially understood?

The Witness: As understood and practiced.

The Court: You were not trying to give me the answer under the statute?

The Witness: No, sir; I was simply saying this, that I believe that in accordance with industrial practice the longshore industry overtime rate does not differ materially from that found in any other industry.

The Court: And that it is overtime as that term is used industrially, and not a shift differential as that term is used in industry?

The Witness: Yes.

(Adjourned to Tuesday, June 25, 1946, at 10:30 a. m.)

Vew York, June 25, 1946; 10:30 o'clock, a. m.

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· TRIAL RESUMED.

The Court: The Court, in colloquy with counsel, explained that one of the reasons which prompted the exclusion of the proffered evidence with respect to the economic impact, of the plaintins' position upon the stevedoring industry was that it would open up a field of issues so vast and invite cross-examination and rebuttal testimony so extensive in character as to bring this type of evidence within the classification of evidence which is not admissible on any ground under Rule 43. The Court

suggested that the witness be asked to condense his proposed testimony into a brief statement, which would then be marked for identification and be available to a reviewing court. Is that a satisfactory statement?

Mr. Goldwater: Yes, sir. Mr. Taylor: Yes, sir.

PHILIP TAFT, resumed the stand.

Direct Examination Resumed by Mr. Taylor:

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Q. I believe when we adjourned yesterday you had stated it to be your opinion that overtime in the longshore industry here in the port of New York is true overtime. Will you be good enough to give us the reasons for your. opinion? A. Yes, sir. First, I would say the relationship between the two rates is such that it would indicate that the second rate is an overtime rate. It is a rate of time and a half, which is a habitual and general rate paid for evertime. Also, the same condition prevails in other industries, and I may mention that an examination of contracks showed them the same type of an arrangement to 1017 exist among the carpenters, steamfitters, sheet metal wankers, painters, electrical workers, cement and asphalt workers, stereotypists, breweries, optical technicians, machinists; glaziers, boilermakers, automobile workers, printing pressmen, retail delivery drivers, boot and shoe workers and leather workers, and furniture workers.

By the Court:

Q. In other words, you mean that in these several trades there are collective bargaining agreements in effect which stipulate stated hours as constituting the normal day and

penalizing by time and a half, or some substantial similar ratio, for work in excess of or out of that schedule! A. Yes, sir; the overtime hours are defined as a given number of hours, or may I put it this way: the regular day is defined, and a statement may be made that all hours worked outside of the regular day shall be paid at overtime rates, or at time and a half or double time.

By Mr. Taylor:

Q. Professor Taft, as the Court worded its question to you, if I understood it correctly, you were asked whether or not the contracts in those industries to which you had referred were ones in which overtime was either in excess or for hours outside of a normal day, and you said yes; is that what you mean? A. I explained it.

Q. Is that what you meant? Is that the way you understood the question? Well, let me put it this way: In the contracts in the industries to which you referred in an answer a moment ago, are those contracts all of a type which divides the day into two parts and fixes the overtime rate as applicable to work done outside of the normal day, regardless of the amount of hours that the man has worked? A: That is correct.

Q. All right. A. The regular day is defined, and all hours worked outside of the regular day are regarded as overtime hours.

By the Court:

Q. Let me ask you this one additional question, Professor Taft. You say that one of the reasons why, or one of the factors which induces you to arrive at the conclusion that this is true overtime and not a shift differential is that the same arrangements prevail in a flock of other industries. What is there to indicate that those industries

have true overtime and are not similarly affected by a shift differential? A. First, in most of the contracts the term "overtime" is explicitly used.

Q. That, of course, is true I think in the exhibit contract, or am I in error! In the LLA, contract the word 'overtime' is used, but we want now explicit evidence A. Also the rate is of a character that you would find-

Q. In overtime? A. That is right...

Q. So we are back to reason No. 1, which is the amount or ratio. A. The ratio; that is right.

Q. In other words the fact that there are many instances in which the same characteristics apply does not give us any clue as to whether this instance in that category is the one or the other; maybe the whole category is one of shift differential. A. Well, frequently in these contracts, sir, you find that the intent is clearly stated. We must remember that labor contracts are frequently drawn by ordinary working men and without the advice of attorneys or economists and the language is frequently imprecise. Now very often you will find that that overtime even under those conditions can only be worked with the special permission of the union officer. In other words, as you look at the entire picture, the conclusion seems to me flows from the entire picture that it is in- 1023 tended to inhibit work at certain hours.

Q. That is, it is an inhibition or penalizing provision? A. Yes, sir.

Q. And not simply the kind of provision which is meant to compensate for the somewhat less convenient time of work? A. Yes, sir.

Q. Your emphasis is that a shift differential is an arrangement whereby work is intended to be encouraged in all shifts - A. Yes, sir.

· Q. by the employers, but that a differential is paid in order to bring that encouragement about; whereas

the overtime feature is a feature which penalizes the employer and tends to discourage employment during that time? A. That is correct. I believe that the order issued by the Director of Stabilization, or the then Director of Stabilization illustrates the point that you have just raised. Mr. Vinson, when he limited the payment of differentials in industry, that is, he limited the orders of the discretion of the War Labor Board, he laid down that 4 and 8 cents as a maximum which could be paid as a shift differential, in any industry. And he held that that was adequate to compensate for those factors which your Honor has enumerated.

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Q. Let me ask you this question. In cases where you have a scale of compensation which you would regard as a shift differential, in other words we will say where the normal day's pay is a dollar an hour and nighttime pay is \$1.10 an hour, you would call that a shift differential?

A. Yes.

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Q. In those cases, from your experience, is there also an overtime provision over and above the shift differential, and is that time and a half or substantially time and a half of the increased shift differential, or of the normal day's pay? A. Your Honor, I would like to answer your question in this fashion. I think I can find an example which illustrates your question perfectly, or I hope it is perfect. In the newspaper industry contracts, the regular day is defined and then certain hours are defined as overtime hours; but if a second shift is put on, that is a regular shift from 4 to 12, then those people do not receive the overtime rate but receive either 5 and 10 per cent in excess of the normal rate.

Q. Take the people in this shift, this shift No. 2 which is 110 per cent of the shift No. 1; if they work 50 hours instead of 40 hours, does your experience indicate that they would then receive 150 per cent of 110 per cent or

do they get 150 per cent? A. They would receive time and a half of their shift rate.

Q. Although the overtime may fall within the period of shift No. 1 time? A. That is right. It would be regarded in those cases where a man worked in excess we will say of 8 hours a day, if the contract limited the day he would be paid on the basis of time and a half for overtime.

Q. What I am trying to get at is this, perhaps to put the word backwards: Does the fact that there is here absent a provision in the contract for overtime on a differential basis constitute evidence in your judgment that it is not a shift differential but overtime? A. Yes, sir. And I may say that the fact that it has inhibited, that actually it has inhibited a large amount of work would indicate that it is an overtime rate.

Q. That of course is a matter of degree! A. Yes, sir.

Q. Even a 10 per cent differential tends to inhibit? As That is right. But the difference of course is that a 10 per cent differential will be absorbed; is within the area that it is possible to absorb it by the spread of the overhead.

Q. By reason of more intensive utilization of tools of production? A. Was.

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The Court: Very well. I want to return your witness to you. I did not mean to monopolize him.

Mr. Taylor: I would be delighted to have you continue.

The Witness: I should also like to call attention to this fact, that these changes that took place in the longshore industry with respect to hours of work were not isolated but were part of a general pattern. Now some industries are usually in advance and others lag and some are in the center. I think in the shorter hour movement the building

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trades have always led the way because they have always been the best organized and have the least powerful employers. But other industries tend to follow. And the longshore industry has not; the changes in hours have not taken place in isolation. It is not peculiar or specific, it is a part of a general industrial pattern.

And then, it seems to me that another fact which leads me to believe that it is overtime is when the schedule of daily hours are changed. For example. at the time they were from 7 a. m. to 12 and then from 1 to 6. Now, your overtime hours were I believe from 7 p. m. to 7 a. m., somewhere in there; but as soon as that day was shortened then the hour of 7 to 8 a. m. became an overtime hour and the hour from 5 p.m. to 6 p. m. became an overtime hour.' In other words, the shortening of the day immediately threw that in as overtime And the same thing is true with respect to the Saturday. It is clearly brought out there. In 1924 I believe the Saturday half day was increased from 4 months to 6 months. How did that manifest itself? Immediately that Saturday half day in' May and October became overtime hours. And in 1986 I believe Saturday afternoons throughout the year became an overtime period. And as soon as changes in hours are made new hours are pushed into that.

And it seems to me that here you have hours being curtailed and a penalty is imposed upon extra hours of work to prevent their work.

Q. Talking about this penalty provision, Professor Taft, are you familiar or does your experience recall to your mind any instances in which the overtime provision

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—or let me put it this way: The overtime device is used, quite consciously, to produce an increase in compensation with the intention of the parties that work shall proceed during the overtime period or a stated or contemplated period of time? That is, a situation, for instance, in which the day is fixed at 6 hours a day, it being understood that work will proceed 8 hours a day, and the intention being purely one of permitting a larger compensation to the employees without unduly changing the hourly normal rate? Are there such instances? A. I can't recall of any, but I can conceive of some. That is, an industry that wishes to maintain its wage structure and as a temporary device may offer a couple of hours of covertime in order to keep people. I think that certainly is possible and probable.

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Q. Wasn't that done on a fairly extensive scale during the war, as a means of increasing the wage earner's compensation and at the same time not to break the so-called line? A. Well, many devices were used during the war to get around the stabilization principle, such as the development of these health and welfare schemes under collective bargaining, and many others. As a general principle I don't believe that—except in cases where an industry would find it exceedingly difficult, temporary difficulties, in getting men would that be true. But certainly not an old established practice that has existed since 1872.

- Q. Does the condition that I have been describing prevail today in the coal industry? A. Bituminous coal?
- Q. Bituminous coal industry. A. I don't think so, sir, because the 36-hour week under which the coal industry operates was really put in as a labor-sharing device back in the N. R. A. days, sir.
 - Q. What I meant is, does the coal industry operate on

a 36-hour week or does it in fact operate on a 48-hour week? A. I think it is about 43.

Q. 43 hours a week. A. Or 42.

Q. And doesn't that fact enter into the negotiations, in the collective bargaining negotiations in calculating out what the probable take-home pay of the employees will be! A. Well, of course we can only derive conclusions from the statements and actions of the parties.

Q. You are the expert. I want to be educated on that A. Your Honor, I don't believe that that entered into the contention of the union which tried to get a larger increase; considering incidental benefits probably the largest increase that has been given to any group in the

United States.

Q. So you don't think that that is an aspect of the industrial relations picture which is acquiring a degree of permanence of jelling into a particular pattern where a day is fixed which is deliberately shorter than the contemplated day's work, with a view to increasing the hourly compensation in fact although not on the face of the instrument? A. Your Honor, I do not believe that that is so, for these reasons: If we examine the industries where the hours of labor are lowest, the clothing industries and the coal mining industry, the reason that those changes were brought about is what you might call chronic underemployment. And, as a matter of fact. those were work-sharing devices. And we can also see that in the clothing industry—I believe I am right, it is either 35 or 36 hours, one of those two; now, in the busy season they will allow a limited amount of overtime, but actually the reason that they have cut the hours of labor is to share the work. I don't believe that as a general principle labor ever intends to utilize overtime as a method of increasing its earnings.

Q. You say that is not a characteristic of a considerable

number of working arrangements at the present time! A. I don't think so.

Q. If it were used, would you then call the penalized time overtime?

Mr. Taylor: May I interrupt at that point and ask whether your Honor means all of the overtime hours, or only those falling—

Q. I say, would you regard the period of time worked in excess of the stipulated time, but within the contemplated time, if I can so distinguish? In other words, assuming purely arbitrarily, where the contract stipulates six hours. a six-hour day, it was the intention of the parties that an eight-hour day shall be worked, but for the last two hours time and a half shall be paid and thus in effect you give the employee a larger day's pay than he would get from straight hours; in such a case, as a student of labor economics, would you say that those two hours were industrial-wise regarded as overtime? A. They would be so regarded, but I should like to add, if I may, that that sort of an arrangement is not likely over a period of time, I agree, sir, that instances can be found, and that has taken place, but it is by no means either a policy or a practice, because the one predominant feeling—it is a feeling because it is not a worked-out intellectual concept-of labor throughout its history, is the fear of unemployment, even in good times; and as you examine the conventions of the different unions, as you examine the statements of labor leaders, beginning with Gompers, or even before him, going back to Ira Stewart or even beyond that, you find this constantly repeated over and over again, that we do not want overtime. We want to reduce the hours of labor to spread the work. So I do not think, while I would agree that an arrangement of that kind is possible and occasionally does take place, but that is an unusual situation and certainly

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not one that could be regarded as normal, or from which practice could be derived.

By Mr. Taylor:

- Q. I think we were asking you to give your reasons for your opinion. Now you had given some, and doubtless many of them have been embraced in your answers to his Honor's questions. Are there any additional reasons you would like to give at present? A. I may simply state that in going through the literature I found in a study made of the "Longshoremen", written in 1915, largely on the basis of a good deal of the testimony before the then Commission on Industrial Relations, which a former president and Mr. Wolff headed, why, Mr. Barnes stated that the introduction of the night rate was designed to inhibit as far as possible work in night hours.
 - Q. Have you further reasons! A. No.
- Q. Is there anything in connection with statistics of which you are aware, the relative amounts of straight time and overtime, that has any influence upon your opinion? A. Yes, I believe that the material that I have been in touch with, that Mr. Smith developed here, certainly demonstrates that the overtime rate or the night rate has performed that function of preventing any large amount or substantial amount of work at night.

The Court: To the extent that during the war that was not so true you would say that was an abnormality occasioned by the extraordinary circumstances?

The Witness: Yes, sir; the industrial practice and concepts are long ranged. They are developed over a period of time, and war I hope might be regarded logically as an accident.

Mr. Taylor: We do not want to open up that question this morning.

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The Court: Well we will resist the temptation. Mr. Taylor: Your witness, Mr. Goldwater.

Cross Examination by Mr. Goldwater:

Q. First of all, Dr. Taft, would you mind giving me that quotation from Barnes, was it? A. Yes, I think I have it. It is on page 77 of "Longshoremen", and I believe that—I do not have the book right with me, but I think I will bring it to you.

Q. You mean you have it here in the courtroom? A. I think it is here.

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Mr. Taylor: Would you like to see it?

The Court: You might identify Mr. Barnes for the record. I think we all know who he is, but would you identify him?

The Witness: He is the author of a book called "The Longshoreman", a study of the longshore industry. Shall I read it, sir!

Q. Yes, I would like to have the specific quotation. A. "Two or three years later an attempt?"—

Q. This is on what page? A. Page 77. Do you want me to give the entire quotation? It is Charles B. Barnes. The book is "The Longshoreman".

Q. Published when? A. It was published in 1915, by The Survey Associates, New York, and I shall read the quotation.

Q. Will you give us the page! A. Yes, page 77, "Two or three years later a demand for 33 cents was granted, and about 1868 another protest was made and the rate was raised to 40 cents an hour for day and night work, but foremen took advantage of this uniform rate to do a great deal of night work. The piers were small, and trucking and tiering could be carried on at greater advantage at

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night when there were no teams to interfere. The men protested against this, and with the desire to cut out excessive night and Sunday work they demanded a high rate for working at these times. In 1872 this demand procured them an advance to 40 cents an hour for day work, 80 cents for night work and \$1 for Sundays."

Q. The book, you say, was published in 1915? A. Yes.

Q. And it recites the history of this inhibition theory as far back as 1870 some odd, was it! A. Yes.

Q. Has that purpose, that theory, that assumption, always been prominent in the formulation of the contract relations between the workers and the stevedoring companies since that time? A. I should say this, that—

• Q. Is that a question that you can answer yes or no, Professor?

Mr. Taylor: You think he should be held to that!
Mr. Goldwater: I am asking him first. I am
not going to hold him if he says he cannot. I am asking him can he!

The Witness: I believe that that has been the

predominant purpose, yes.

Q. And that has continued to be the predominant purpose from 1870 down to date; is that correct? A. Yes.

Q. In assigning your reasons for distinction between the shift differential and true overtime, you stated that in one or more cases the parties called it overtime; is that correct! A. Yes.

Q. Is that one of the reasons that influenced you in determining that it was true overtime and not shift differential? A. No, sir; that was not one of the reasons.

Q. Why did you then mention it as a factor in your consideration? A. I think I just elaborated a particular point. I did not give that very great importance, and I will ask your permission, and if you do not want me to I shan't

do it, that I can tell you exactly how I reached that conclution, and the history of my relations to this particular problem I think I will demonstrate that I was not influenced by the particular terms used.

Q. I will accept your answer that you were not influenced, Professor. We will be here until next week if we are going to have a complete elaboration on every thought that you have. A. I am sorry.

Q. That did not influence you? A. No. sir.

Q. In any case in which you examined contracts that you have mentioned in your direct examination, did you give any weight whatever to the descriptive term used for the hours outside of the so-called regular hours of employment? A. No, sir; I do not think that the term used is of significance.

Q. All right, and you would say that that equally applies in the case of the longshoremen's contract? A. I would say that.

Q. The fact, then, that this was called "overtime" for the last 60, 70 or 80 years, in all written arrangements for employment in the stevedoring industry, would have no significance whatever in a determination of whether this payment for so-called night work is or is not true overtime? A. It would reveal what the parties regarded it. I would try to use my judgment, not only to determine the intent of the parties but what its intent is as far as the effect on operations might be. In other words, I would not go as far as saying that the language that the parties used in arriving at an agreement was of no influence in trying to determine what they had in mind when they were making the agreement.

Q. Did you give it weight in making up your mind as to what this was, or was it just a matter of historical interest to you? A. Well, if I had found it independently, I think what it did is corroborate what I would have

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e reached independently of it. I think that it has corrobordative weight in my mind. The fact that they referred to it as overtime would corroborate my first impression and conclusion that it was.

Q. You have examined the contracts here, haven't you! You have been shown the contracts in vogue or use in this industry in the port of New York for the last 50 or 60 years? A. Since 1916 I looked over the contracts.

Q. Did you find the term "overtime" employed in those contracts—how far back? A. I believe somewhere in the late 1930s the term "overtime" was introduced. Prior to that time it was referred to as "night rate", but—

Q. Referred to as a night rate?

Mr. Taylor: Excuse me, didn't you say "but"!
The Witness: Yes.

Mr. Taylor: Won't you continue with your answer?

The Witness: I would say this, that the terms "overtime" have appeared and reappeared in the discussions of the problems in the releases and in the information that was circulated among the employers, and also in the union leaflets. In other words, the term "overtime" was never absent. It was absent from the contracts, but it was not absent from the discussions nor from the information that the stevedores circulated among ourselves, of the union circulated among itself.

Q. The term "night rate" was used from 1930 back, wasn't it! A. Yes.

Q. Did you give that significance and consideration, that concept, as applicable to your concept, as applicable to this case! A. Yes, sir; of course I gave it consideration. I considered it in the light of all the circumstances, first

that it was purely and customarily a term used out of habit or custom; secondly, that obviously when the steve-dores were discussing the problem of a union agreement among themselves, that the unions were discussing, or the members were discussing demands among themselves, they used the term "overtime", and also in relation to the word "rate", would also indicate to me overtime. So here I had an overwhelming amount of evidence against this one term. Of course I considered it, but I do not before that I could draw a logical deduction from that that it was not overtime.

Q. You gave consideration, then, to the term which the

parties had used up to 1930 odd? A. Yes.

Q. Then you rejected it as having any influence and indicating the intent of the parties; is that right? A. I did not reject it. I regarded that as a synonym for the term that they used in other connections to discuss the same problem and the same question. I do not believe that I rejected the term. I think that the term means overtime. It is a synonym for it.

Q. I see. And in your concept of terms in labor economics you would use "night rate" and "overtime" as interchangeable, would you? A. If the night rate showed the characteristic of the night rate in the longshore in-

dustry I would use it interchangeably; yes, six

Q.And the characteristic, as I have it from you in your testimony yesterday is this, if I may quote your language— A. All right, sir.

Q. It is that overtime in your opinion is when it is a rate designed to inhibit work at the hours mentioned, or after a given number of hours; is that right? A. May I clarify that a bit?

Q. You certainly may. A. I meant that overtime might be a number of hours, that is, hours after a number of hours had been worked, or specifically enumerated hours.

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Q. You said that very clearly. A. Yes, that is what I mean.

Q. There is no question about what you said, Professor. And you added that you can recognize whether it is a shift differential or whether it is an overtime rate. Those

are your words? A. I believe you can, yes.

Q. Suppose you tell me as clearly as you can how you, Professor Taft, can recognize whether it is one or the other? A. I can recognize it by the relationship between the second rate and the first rate. If it is an amount that is usually imposed as a penalty or is designed to prevent work at certain hours, I would hold it to be an overtime rate. .

Q. How do you determine whether it is usually imposed or is designed to prevent work at certain hours? It that a subjective study with you, Professor Taft, or is it objective? A. No. it is subjective.

Q. I see. Then it is a question of what your reaction is to the facts, your personal reaction to the facts, which determines when you say you can recognize! A. Do you

want me to answer that question?

Q. Yes, of course I would like you to. A. If you mean my personal reaction to the facts, what I do when I see situation, I attempt to judge it in the light of my knowledge and experience. If you call that a personal reaction, that is correct. I did not know that judgment is anything but personal... It is a matter of judgment.

Q. I would like as specific an answer as you can give me as to how you recognize whether it is a shift differential or an overtime rate. Let me call your attention to the fact in connection with the question, Professor, that so far you have told me only one reason; and in answer to his Honor's series of questions before you related every thing to that one reason, to wit, the relationship between the two rates. Now is there any other reason?

The Court: Or any other index of identification.

Q. Of course, that is what I mean, that aids you in recognizing it. A. No, the reason is as given. I think that is correct. I think that is the heart of the entire

problem, what is the purpose of those rates.

Q. That is not the same thing. You say now you determine what is the purpose. I asked you if there was any other factor or index, or his Honor used the word "index", that would indicate to you the recognition of the difference! A. No; I would try to determine this. If you gave me some raw rates, if I may use the term.

Q. I think I know what you mean. A. And I noted that there was a time and a half rate, I would normally assume, and that assumption is supported by a large amount of evidence, that that rate was designed to prevent work. If, on the other hand, there was a small change between one rate and another, it would seem to me—it could be reasonably inferred that what you are trying to do is to compensate people for working at less attractive hours, and that this difference is really, as it was phrased by the War Labor Board, some compensation for differences in job content.

By the Court:

Q. Supposing you had this situation: I want to get the degree of significance that you attach to express purpose. Supposing you had a labor agreement which said that in order to inhibit work between the hours of 4 and 6 in the afternoon the rate shall be 110 per cent of the normal day's rate for those two hours; would you call the overtime provision or a shift differential! A. A shift differential

Q. Supposing you had this situation: Supposing you

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had an agreement providing for fliers who fly large and heavy aircraft, and it said flight by day shall be \$2 an hour, flight by night shall be \$4 an hour, and said nothing else, would you call that a shift differential or would you call that, an overtime provision? A. I think that you might have to discover whether the job content was so radically changed.

Q. In other words, I picked a hard case. A. Your Honor, may I say just one word on this question of shifts? Before there is a shift differential you must have a regular shift. Now, you can't have a shift differential without the ex-

istence of shifts.

Q. Suppose you had a flying agreement which said the normal flying time shall be from sunrise to sunset and during those hours the rate of pay for flying shall be \$2 an hour for all flying performed whether begun or continued through and after sunset and before sunrise the rate shall be \$4 an hour? A. I think that that is an overtime rate, and for this reason, that under normal circumstances a wide spread between two rates of pay for the same job could not be normally maintained.

Q. Would you be interested in such an agreement to discover, for instance, whether the risk of employment was much greater during night flying than during daytime flying and, therefore, treat it as a shift differential! A. If it could be demonstrated that that were true, that the content of the job in one period were significantly different, a rotation would have to be made. I think,

your Honor, I would be willing to accept that.

Q. Would accident incidence be a factor that would affect the judgment in such a case? A. If it could be demonstrated that the accident incidence were significantly greater, I think that you might draw the conclusion that there was compensation for the difference in risk.

Q. Supposing you had an industry which, of necessity,

operated round the clock, then would your judgment be affected by that, regardless of the ratio of compensation? In other words, supposing you said that for railway engineers operating transcontinental railways the rate of compensation should be \$1 an hour between the hours of 8 in the morning and 5 in the afternoon, \$2 an hour between the hours of 5 in the afternoon and 3 in the morning, and \$3 an hour between the hours of 3 in the morning and 8 in the morning? Manifestly, that is not intended to inhibit railroad transportation. A. Well, it would reduce—

Q. It would tend to do that! A. It would tend to reduce all the possible traffic; that is, the railroads would run transcontinental trains but certainly would not run locals at those hours where they would have to pay—

Q. This was a rate that I limited to transcontinental. A. Transcontinental is in the nature that could be defined—

Q. Of a round-the-clock operation. A. In the nature of an emergency. With any of the union contracts, that is the reason there is not an outright prohibition; there is no union contract that I know—there may be some—that explicitly prohibits work beyond a certain time, because there may be a job that is in the middle, you may spoil materials, you may require the filling of an order. So you can't, it seems to me, outrightly prohibit. Now, your example of a transcontinental train seems to me would come in the nature of an emergency; that you couldn't stop at Kansas City,

Q. You could not call an emergency that which is scheduled to occur every day of the year? A.. Well, it is an economic emergency. I think, because the railroads could not handle the problem any differently.

Q. That is right. The same as operating a ship at sea. Suppose you found a contract for seamen at sea which

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provided for 50 cents an hour between the hours of 8 and 5 and \$1 an hour for the hours from to 8 in the morning. What would you call that? A shift differential? A. No. I would call it an overtime rate.

Q. Even though it was on board ship, where obviously it is not intended to inhibit work. A. Well, it would inhibit work, because a large amount of the work at sea can be done at different hours. In other words, only the engineers and, I suppose, some of the sailors were on immediate duty, but there is a great amount of work that would be concentrated.

1073 would be concentrated.

Q. I have to modify my example. Suppose you had a contract which provided for engineers and helmsmen only on board ship? A. I am afraid that you are cornering me.

Q. I am cornering you because I want to know just at what point you would abandon your ratio and say that other factors may predominate. In other words, supposing you had a contract that provided that helmsmen on ocean going vessels will be paid \$1 an hour during the daytime hours and \$2 an hour during the nighttime hours. Would you call that a shift differential?

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Mr. Taylor: Would you include in your question how many helmsmen you have on board? I assume that you have to have somebody at the helm.

The Court: I am assuming that there is somebody at the helm 24 hours a day.

Mr. Taylor: How many have you got?

The Court: I don't know.

Mr. Taylor: If you only had one man on board the situation is vastly different from what it is if you had plenty of men there.

The Court: I assume that you could not have one man on board unless you were going to keep him operating for 24 hours.

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The Witness: You would need three men.

Mr. Taylor: I think you would have to have some number in there to make your question realistic, sir, if I may say so.

The Court: Suppose you have the necessary

complement there. Say at least three.

Mr. Taylor: You would have three 8-hour shifts, you mean.

The Court: I don't know.

Q. You have three men on board, or maybe 15 men, all men on operations which are round-the-clock operations; the radio man, the helmsman, the fireman, the engineers, and so on. I suppose there are a certain number of operations on board ship which are in continuous operation. A. Yes, sir.

Q. Now, let us group those into a single union, the "round-the-clock operations union"; and you have a contract with respect to those men which says daytime hours \$1, nighttime work \$2. Would you say that is a shift differential or an overtime rate! And nothing more appears. A. I would be inclined to call it a very unusual kind of overtime rate, sir. I would stick to my definition because I think—

Q. Well, now, would you stick to your definition? Your chief ingredient of your definition is the inhibitory effect?

A. That is right.

Q. Here you have a situation in which it has no inhibitory effect and, moreover, it is not designed to have an inhibitory effect. A. But, your Honor, any contract of that kind would get back to the example that you gave before, where the purpose of that overtime provision would be to increase the rate. And I would say that that would be a very unusual situation; that in the normal industrial practice you are not likely to get that.

Q. I agree with you that that would be an unusual situation, and manifestly in trying a case of this kind we do come up against the unusual situation, because the obvious does not get to the issue. That is clearly so. In other words, when a case gets in here it is because there are two plausible views which have to be resolved. If one was manifestly right and the other manifestly wrong it would not be in court.

Now getting, therefore, this hard situation, the situation where work has to proceed around the clock, you have a ratio of 2 to 1 for nighttime as against daytime. What would you call it? Overtime or shift differential?

Mr. Taylor: Io understand we may object to your Honor's questions?

The Court: Yes, you may.

Mr. Taylor: I still think that it is only fair—I mean, it will tend to develop the thinking more if we have in your question something as to whether there are shifts and how many men you have on board. I think you are assuming, sir, a situation which is impossible of existence in a industry, including ships at sea.

The Court: I am assuming quite a group of men.
Mr. Taylor: In other words, whenever you have a round-the-clock operation you will of necessity have assignments within the normal 8-hour stand of whatever number of men is necessary to fill it. If you want to assume just for the sake of theoretical discussion any combination in which you have an admitted shift system and you put in an extraordinarily high differential, why, you state a situation which probably would never be found to exist.

Q. I will assume the situation which normally does obtain on board hip which is that the man's tour of duty

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shifts from day to day progressively and rotates, so that in the course of a voyage the man serves in all periods of time. A. Your Honor, under those conditions what you really get, and I think that that would be the practice, is a spread really of this so-called—what you would get is an increase in the rate. In other words, every man would receive \$1.33 an hour because of the fact that in their rotation they would all absorb one-third of the difference. So what you are actually getting there is an increase in pay, and—

Q. When you get an increase in pay, or when you so regard it as an increase in pay, then it begins to approach the shift differential rather than overtime; in other words, it becomes part of the normal compensation of that

person?

Mr. Taylor: May I interrupt again?

The Court: _Certainly.

Mr. Taylor: Do you mean, when you get an increase in pay in a situation where there is a shift—

The Court: No. The Professor says, as I understand him, that in such circumstances the more normal way to translate that desire into effect would be either actually to give them an increase per hour pay for all hours and abolish this differential or in net effect it would be translated into such an arrangement and that the man would regard himself as receiving \$1.33 over-all rather than \$1 an hour for daytime and \$2 an hour for night-time.

The Witness: The problem as I see it arises largely that you have assumed the existence of shifts, and where there are actual shifts there are regular shifts. It is not likely that you would get

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Philip Taft-For Defendants-Cross.

that type of difference. That is not likely. In the examination of—I think I have them here, quite a number of cases—

The Court: I think we will have to suspend. We will have a short recess.

(Short recess.)

The Court: If counsel will bear with me I will just ask one other question.

1085 By the Court:

Q. Professor Taft, what I was trying to get at in the few questions that I pursued by hypothetical example which in a way are unreal, because I will agree that there are either none or very few such actual situations in life, but what I was trying to get at was this: I assume that your view is, and you correct me if I am in error, that you do not maintain that the 1½—1 ratio is the invariable guide to overtime as against shift differential, and that once you have found the ratio of time and a half you must decide that it is overtime regardless of every other fact? A. Well, no, sir. It is quite possible for the conditions that you assume to exist; but I would say this, that they would be abnormal, a deviation from the norm, and would take place under very special circumstances.

Q. Can I put it in legalistic terminology, to which I am more accustomed than to the economists' language, to say that when you find a time and a half ratio you have a fair presumption that it is time and a half which may then be

rebutted by strong evidence to the contrary?

Mr. Taylor: Does your Honor mean we have a presumption that it is time and a half or that it is overtime?

The Court: That it is overtime.

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A. I would agree with that.

Q. That is a fair statement of your view? A. That is

right.

Q. Now what I would like to ask you is, what type of evidence could rebut that presumption? To give you an illustration of what I mean, does the fact that the time and a half rate is under the circumstances incapable of performing an inhibitory function constitute evidence which would tend to rebut that presumption?

Mr. Taylor: Could I ask your Honor what you

mean by incapable?

The Court: I mean that if the operation is a round-the-clock operation which must go on 24 hours a day so that it is compulsory to infer that the higher rate is not designed and cannot accomplish the purpose of inhibiting work during the penalized hours.

A. May I answer your question in this fashion, that a rate, a wage rate is paid for several-well, may I call them factors; the skill of the individual, the risks, the unpleasantness of the work, the dangers, all of that will determine the rate. Now, when we go into any industry you find that there is usually what is called a job-a wage structure. Now, what is the wage structure! It is the relation of one wage to the other. How is it determined? I don't suppose it is determined always with great precision, but there is an attempt made to estimate. What is the importance of this factor? Education, experience, risk. An extreme example might be a man working with a pick and shovel on a building who may receive \$1.00 an hour, while if he works under pressure building an under-water tunnel he may receive \$3 an hour. Now, the reason for that is for the peculiarities of the job, for the special dangers to his health, and risk.

Q. I follow that. A. And there of course you don't

find that, or you are being compensated for something that is in the job. In other words, the content of the job is different.

Q. I suppose old-fashioned economists say that it is determined largely by supply and demand. A. Yes.

Q. And that in order to get the supply of labor for the kind of peculiar job that you specified, a differential has to be paid? A. That is right, sir.

Q. The free play of the market when it is uninfluenced by legislation or unions will produce that kind of a differ-

ential? A. That is right.

Q. That does not answer my question, however, which is: Where you have a set of facts which preclude the inference that the time and a half ratio has an inhibitory effect, precludes the inference that it is designed to have an inhibitory effect, do those circumstances constitute evidence—that is what I am asking you—do they constitute evidence which would have to be considered in rebutting the presumption that we have arrived at?

Mr. Taylor: I wonder if I would be trespassing on the techniques here—

The Court: No, you would not.

Mr. Taylor: —if I should ask your Honor to make an addition to your question by asking Professor Taft whether the change which occurred in the potteryware industry when they shifted from a 6-kilnto a continuous operation might afford an answer to your Honor's question?

The Court: I am not prepared and not sufficiently well informed to lead the witness by suggested examples. I am purely now engaged in the Socratic process.

Mr. Goldwater: Of course that is where Mr. Taylor has it on all of us—his ability to lead the witness.

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Q. Do you get my question? A. I understand your question, but here is the problem that I face. Your question assumes a condition which to me does not seem economically feasible. In other words, the amount needed to attract a worker to another shift is usually a few cents more per hour. And of course I can't see, knowing employers, why any employer would want to or need to pay that great differential on a shift because the content of the job does not change so drastically between one shift and another. In other words, here you have a condition: Does the nature of a job, handling the same material, exposed to the same general risks—they may be slightly greater or the same; does the content of that job change drastically?

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Now it seems to me, your Honor, a bit unreal to assume that a firm that can hire a man on the first shift for \$1 an hour would have to pay \$2 on the second shift.

Q. In other words then we come back to the fact that your presumption is irrebuttable because economically you say that the rebuttable evidence can never exist. So, therefore, we resolve the question first by saying that where you find a ratio between one time of the day and another time of the day of one and a half to one or more, the presumption is irrebuttable that that is an overtime rate, and that no evidence can be envisaged which would cause you to come to the conclusion that it is a shift differential. And when I say envisaged I mean in the light of your experience as an economist dealing with economic realities. I don't mean logically envisaged. I now mean realistically envisaged. A. Thank you, your Honor; I was going to take exception to your term "envisaged," but you have clarified it. And I shall answer I agree.

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Q. All right. That is all I am driving at, is to try to get a precise understanding of your view. A. Yes. Because I don't see any economic need, for, after all the contents of a job between 5 and 6 is not substantially different than

4 to 5. And the increase would not be economically war-

Q. What about the possibility that it is used by a powerful union as a device for actually increasing the normal day's pay? A. Well, in this instance I would hedge slightly my answer in order to be fair; I would say that that can be envisaged economically. But in the light of the general attitude and the historical experience of unionism that that is not likely to be the case.

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Q. Not likely. Nevertheless, you would now come along to this point, at least as a possibility. Let us suppose you had a powerful marine radio operators union which has to be tended 24 hours a day. It is conceivable that, from a public relations point of view, they would rather say they are asking for a dollar an hour straight time and two dollars an hour overtime rather than to say they are asking for \$1.50 an hour. And therefore it is possible, since they operate on a rotational shift basis, to say that they are asking for \$1 an hour for all daytime hours and \$2 an hour o for all nighttime hours, the parties perfectly well understanding that the net effect is that the radio operators are going to make about \$1.60 an hour as a result of that scheme of operation. In such a case would you call that an overtime rate? A. Well, if it is as you have stated it, it would not be, sir.

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Q. It would not be an overtime rate. A. But I again wish to emphasize this fact, that certainly that type of devious approach to the problem of increased wages is not only untypical but would be very rare.

Q. Let me ask you this, perhaps to drive my point just a little further. If you found such a case, express and explicit, then would you even call it a shift differential? Would you not call the higher rate the normal rate? A. Well, it would seem to me—

Q: Calculating it on the basis of arithmetic. A. That is right. It would seem to me that, after all, the intent there

was simply to get 33 cents for each person around the clock. In other words, a dollar increase; one person is on the second shift, and on the third shift, and actually I would say they were getting \$1.33 an hour.

Q. That would be therefore their normal wage, their regular wage? A. Yes. I would say there that you had a condition of a disguised wage increase, and I think that under those circumstances that whole problem of whether it is a shift or overtime would not exist.

Q. You would be beyond those two classifications; you would be then in the field of determining the regular wages! A. Right. I think that would be my conclusion, that what they were actually doing was to get an increase in overtime—rather, in increase in their daily hourly rate.

Q. What evidence would you require that such is the fact? Would it be an explicit statement in the labor contract, or just what evidence would lead you to draw such an inference?

Mr. Taylor: May I ask whether your Honor is still assuming the existence of the continuous round-the-clock operations?

The Court: Yes. And the rotational shifts.

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A. Well, part of the evidence would be undoubtedly the spread between the rates, the spread between the rates. I would ask myself the question, now what is there, why should a man be compensated, and, after all, he is rotating around; why is this difference there? And certainly it can't be justified economically. The content of the job is the same or pretty much the same. I would ask myself that. And to some extent we would have to examine the history of labor relations in that particular industry. The intent of the parties might reveal something.

Q. So, if you found a case where there was a rotational shift and a scale of index 1 for normal time and 1½ for the non-normal day, as defined, where there was no economic explanation of the differential you would say that it is really a system of distinguished wage costs? A. Yes.

Q. Now, let me ask you one final question, and to this an objection will be made, and maybe I shall sustain it.

Would you call the three-shape-up system, three-shape system in the longshore industry, a three-shift arrangement with voluntary rotation on the part of the employees, since they can appear for any shape that they choose! A. I was waiting for the objection.

Q. There being none, you may answer the question. A. I will answer the question. No, I would not regard it, because after all a man is not—the shift was not laid out there that a man begins at this hour and quits at this hour and he reappears every morning regularly. A man who works on a shift, what does he do? He works; let us say that the shifts rotate every week. Well, every day, every working day he will appear at a given time and quit at another time and someone will take up there and quit at another time and so forth. You don't have that regularity of work. You have simply the regularity of applying for work.

Q. Well, all right. That is in a sense true in every industry which is slack. A man shows up for work and the foreman says, "No work today," and he goes home. A. But he shows up for a specific time of work.

Q. Yes. Isn't the shape-up time a specific time? The shape-up time I have been instructed in this case is 7:55 a. m., 12:55 p. m. and 6:55, I think, p. m. I haven't yet heard the claim made that for those five minutes it is within the portal-to-portal case.

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Mr. Goldwater: That sill come later.

A. Moreover, as you were enumerated, the shape is within a regular working period.

Q. Yes. A. In other words, here is the regular day, from 8 to 5, and here are men applying for work at this particular period. I don't see the shape-up as a shift. It is purely hiring time.

Q. Wouldn't you call the 6:55 p. m. shape at least a

shift? A. No. I would not sir.

Q. Now then, tell me why. A. I would not because it is not a regular period that is outlined very definitely for men to arrive to go to work and work a given number of hours and then leave regularly every day. In other words, a man can work all day or all night, whenever he can catch a job. It is not a matter of men appearing at 8 o'clock and working until 5 or appearing at 5 and working to 1. It is a matter of a man getting a job at given hours.

Mr. Taylor: Am I to assume that your Honor thinks there is a shape at every pier three times a day?

The Court: No. I assume there is a shape only at those piers at which there is work to do.

Mr. Taylor: That is right.

The Court: And that by way of the grapevine the men know which piers are going to be shaped, or may know by visual inspection if they see boats come in. Also, I suppose there are men who keep in touch with their officers and get a pretty good idea when they are likely to get work. Then I suppose there is a percentage amongst longshoremen who don't want regular work, they prefer the non-regular work. I say a proportion.

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The Witness: That is right.

The Court: And I suppose there are those who undoubtedly work five days a week, the same as a man making hats in Danbury.

- Q. Let us take it this way. During the wartime there was plenty of work for everybody who wanted to take it; isn't that right? A. Yes.
- Q. That is, at almost every pier. And that the lack of work at a particular pier was as abnormal a situation as a machine going out of order in an industrial factory and the man having to be laid off that day. Now, during that period there were a group of men that showed up every morning for work at 7:55 and they worked until 5 every day; another group showed up for work at 6:55 and they worked a period of time thereafter, under the contract not less than 4 hours.

Now, why isn't that a shift? A. It is not a shift! would say largely because this device of time and half for these hours was worked out in the industry in order, under normal circumstances, to prevent work at those hours. And the evidence indicates that that is true.

- Q. I follow that. A. And it seems to me that you cannot by "you" I am using the general "you", siryou cannot interpret the meaning of an industrial practice that has been developed over a period of time and that has been worked out between the industry and its collective bargaining agents in terms of abnormal circumstances.
- Q. Well, let me ask you just this last question; I think I shall then surrender my function of cross-examining. Would you agree or disagree with the proposition that longshore is industrially speaking sui generis? A. No, I would not, sir; not to any other degree than any other industry. Every industry has particular characteristics.

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Some of the characteristics of the industry may be due to laziness or slovenliness or lack of efficiency, but so is the steel industry.

Q. Have you any other industry in which you have a new hiring at every period of employment, every daily period of employment? A. No, none that I know of, sir.

Q. This is the only one where that prevails? A. Yes. But the industry in its practice with respect to hours and overtime has followed the general pattern of American industry.

Q. I understand that. But at least it is sui generis in that it is the only industry that you know of which has a new hiring for every daily period of employment. Is there any other industry that you know of where the employee does not have a long time employee-employer relationship with the same employer but where he changes employers with the frequency and rapidity and fluidity that he does in longshoring? A. No. I think that those two characteristics are—

Q. Are unique? A. That is right. But I do not believe that those establish particularly the overtime or the hourly practice of this industry. I think that it is part of the large—the changes that have taken place there are changes that are in other industries. The fact that you have definitions of overtime in other industries similar to longshoring, the fact that it went through the same process of changes as other industries at approximately the same time, the fact that the relationship between one rate to the other is the same has existed in other industries—I mean, all of those seem to me to be more preponderant characteristics than those that have been enumerated by you, sir.

The Court: Very well, you may continue, Mr. Goldwater.

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By Mr. Goldwater:

Q. Before I proceed, Dr. Tart, would you be kind enough to tell me what release you referred to when you said that there was an order of Stabilizer Vinson which laid down a 4 and 6 cent as a maximum that could be paid as a shift differential? I would like to see that order. A. It was issued on March 8, 1945, and I am very sorry that I cannot give you—

Q. The date will be sufficient. I should think we should be able to find it. A. Do you want me to read a quotation from it!

Q. Is it very long? A. No, it is two sentences or three sentences. It ordered the following policy:

"Shift differentials and non-continuous operations not to exceed 4 cents per hour for the second shift, and 8 cents per hour for the third shift."

Q. Had it reference to a particular industry? A. No, it was a general order given to the War Labor Board, a general directive on what policy that Board was to pursue with reference to ordering shift differentials.

Q. It had to do with the policy of ordering shift differentials; it did not in any way limit the amount which might be voluntarily paid for shift differentials? A. Oh, no sir, because at that particular time the War Labor Board passed on all voluntary increases, and there was great pressure to loosen up. As his Honor has indicated here, there was a lot of pressure to loosen up and get around the stabilization orders, and this was a directive to the War Labor Board telling the War Labor Board, or instructing it to limit differentials, whether voluntarily reached or ordering them down to those amounts.

Q. May I ask you whether you know that that specific order to which you have referred had any exception in it? A. I do not recall right now.

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Q. And your material here is nothing more than those paragraphs which you read? A. That is right.

The Court: The only exception I noted in your statement was that it applied to non-continuous operations.

The Witness: But on continuous operations it was lower, because the most favorable treatment was given to non-continuous operations, because those were the industries that had to attract people, not having operated shifts prior to the war.

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Q. Do you know whether or not the effect of this order was not to disturb in any way prevailing practices in an industry? A. Oh yes; it had nothing to do with the pre-

vailing practice.

Q. Then the issuance of this order by the Stabilization Director had specific purpose in connection with unusual increase in wages from the standpoint of the inflation effect, did it not? A. Yes, the intent, of course, was to limit wage increases, but the Stabilization Director regarded those differentials as adequate for the purpose of attracting workers to the non-desirable shifts.

Q. That would be, of course, in companies where it 1119 had never been paid before; would it not be so? A. That

is correct, sir.

Q. And in companies where there had been a greater variation they were not only disturbed, but the experience obviously from the fact that they were continued, those practices were continued, indicated that those practices served the purpose of obtaining employees for those different shifts? A. Yes, sir; the policy of the Stabilization Director and of the War Labor Board was not disturbed in any appreciable measure any practice. I merely cited those to indicate what a shift differential is.

Q. No, but you did not in citing them indicate that the purpose of the issuance of the order was for its economic effect upon a fearful inflationary trend; isn't that so! A.

You are quite right.

Q. And that was the sole purpose to which the Economic Stabilizer had directed his attention; isn't that sol A. No, I would not agree to that statement, because the Economic Stabilizer was faced with two problems—get war production and prevent inflation. He had to devise a policy which, while being anti-inflationary, would also be effective in allowing firms to attract labor to the non-desirable shifts, and he obviously thought that 4 and 8 cents were adequate for that purpose.

Q. In spite of that directive do you know of your own knowledge, Professor Taft, of numerous devices that were employed to provide extra compensation for the various shifts? A. Not on a shift basis, but I do know of quite a number of devices that were used to evade the

stabilization order.

Q. This stabilization order as well as others? A. No, not that particular one. It would not be necessary to evade that one. The problem—we should not be talking of evasion, perhaps, here, but the problem as it presented itself to an employer would be to get around this limitation that the War Labor Board would place upon him and usually it was gotten around by paying for insurance, by setting up a welfare fund, by combinations and in that manner, but on all shifts. That is, it was throughout the plant rather than on a particular shift.

Q. And you do not know of any cases in which there was a particular drive towards these evasive tactics in order to secure sufficient employees on night shifts? A No, sir; I do not know of a single one. I was an employee of the War Labor Board, and Locould not officially

know of it, anyway.

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Q. Oh, that may explain your lack of knowledge. A: But I did not know.

Q. Is the fact that you were an employee of the War Labor Board-does that perhaps explain that your interpretation of these devices might be quite different from that of another person? A. Oh, no sir, I was only a per diem employee, anyway, but I would not allow that to influence my opinion.

Q. You do not think that even unconsciously you might be influenced in your opinion by the fact that you were then an employee? A. Sir, without being facetious, I certainly would not sit here and say that I am not unconsciously influenced by things that happen around me but I will say that I have tried not to be consciously influenced.

The Court: You have devoted a lifetime to screening out unconscious influences?

The Witness: I have tried to.

The Court: That is what professional work means.

The Witness: I have tried to be as objective as possible. I would not agree that I can be perfectly objective. I do not claim that.

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Q. Now, Professor, you have used the terms "shift differential" and "overtime rate", and have not described "shift differential" except in terms of the purpose to be achieved; I would like to ask you whether in using the term "shift differential" you used it in a broad enough sense to include a rate of pay for a tim worked which was not normal day hours time? A. No, sir.

Q. Not in that broad sense? A. No, sir; I used the term "shift differential" to describe an extra payment. a small extra payment that is given to people who are

employed on the less desirable shifts, and to use the expression for some change in the content of the job, the content of the job meaning that it is less pleasant to work between the hours of 5 and 12, when your family life is disrupted than it would be between the hours of 8 to 4.

Q. Would you include also the hours of 1 a.m. and 7 in the morning? A. Oh yes, I mean that; that is right.

Q. You say that you used it to describe the payment of a small difference in rate of pay; is that right? A. That

is right.

Q. Then you would never use the term "shift differential" to describe a difference for the purpose which you have indicated, which was a large difference between daytime work and night time rate! A. I would say this sir, that the fact that you had a large rate would, in the first place, create in my mind a presumption that it is not a shift differential.

The Court: What Mr. Goldwater is trying to elicit from you, Professor Taft, if I may come to somebody's rescue— I don't know which is whether you are excluding large payment by definition. Of course if you are we are no place at all. Do I correctly construe your question?

Mr. Goldwater: Yes, exactly, your Honor.

The Witness: Oh, I see. I would say this, that on the basis of the cases I have here taken from the reports of the War Labor Board, I find only one case where a shift differential was more than 15 cents on the hours. As a rule they are 3 and 5 cents, 5 and 10 cents, that is for the second and third; and, consequently, if I saw this larger differential I would have to examine it, and unless the evidence were predominantly on the other side

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I believe that I would assume that it was an overtime rate.

Q. You say in examining the War Labor Board cases you find no case in which a shift differential was more than 15 cents an hour; is that right? A. Yes.

Q. That presumes, therefore, that you must first find that the case is a shift differential case, and then see

what is paid; is that right?

The Court: He means that you first have to have a tag on each one of those cases, labeling it shift differential, because you can say that all shift differential cases were only 15 cents.

The Witness: Oh, I see the question.

A. That is true. That is where the problem comes in. The reason I mentioned these cases is because the question of payment for different shifts was an issue in dispute.

The Court: If you say that all six-legged creatures are insects you are not telling us anything if you define all insects as six-legged creatures. If you say that all shift differentials are 15 cents then you are not telling us anything when you say there is no shift differential in excess of 15 cents.

Mr. Taylor: May I get in my two cents at this point?

The Court: We are dealing with inflationary economics.

Mr. Taylor: I think that the confusion, if there is any confusion, arises from the definition by Mr. Goldwater of what he means by shift differential.

Mr. Goldwater: I thought that is what you produced this witness for, Mr. Taylor. I did not think I was supposed to testify to it for you.

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Mr. Taylor: Isn't it quite clear that the witness, in talking about shift differential cases is talking about cases where there jolly well are two or more shifts? Mr. Goldwater is trying to drag in cases where there is a higher rate of pay for one time than another. We will never meet on any such basis as that.

Mr. Goldwater: I have not gotten to any such basis as that. You wanted the witness now, so I think he is probably prepared, if he was not before.

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Q. Now, Professor, what I am trying to get at is whether we are not up against the egg and the chicken here. Which comes first? Do you determine first if there is a shift differential and then look at the hours and say, "Now, that is a shift differential because it is 10 or 15 cents", or do you look at the case and say it is 10 or 15 cents. Now I know it is a shift differential? A. Let me put it this way: How do I know that this is a shift differential? First of all, every one of these cases that came before the Board had shifts.

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The Court: You mean more than one?
The Witness: More than one shift.
The Court: Working period.

The Witness: That is right, more than one regular working period, beginning at a particular time and ending at a particular time, the second shift designated as beginning and ending at a certain time, or sometimes the third shift. So that was the first test, that they were actually regular shifts. Now what is the second? How do I know it is a shift differential? First, because the collective bargaining agent—all of these are dispute cases came in with a claim that we are entitled to more for shift 2 and shift 3 than we are on shift 1, and gave these reasons that I have enumerated; and, therefore, the dispute was over a shift differential, whether you are entitled to more pay on the second and third shift for doing the same type of work than you are on the first. So I knew it was a question of shift differential, because the problem was whether there should be a wage on one shift in excess of the other, and—well, I will stop at this point, sir. I do not want to be longwinded.

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Q. And you say that this industry, the longshoremen's work, has a characteristic that you have not found in any of the cases which you have examined, to wit, the characteristic of the shape-up three times a day; isn't that right? A. Well, I answered yes.

Q. It has been called by one of the defendants' witnesses here a unique industry in that particular; would

you agree that it is unique?

Mr. Taylor: In what respect? The Court: In the daily shape.

A. In the daily shape, yes.

- Q. Now, does this shape three times a day tend to irregularity of work, or is it the irregularity of work in your opinion that requires the three times a day shape!

 A. The latter.
- Q. You have said that a rate of pay is determined by several factors, and in answer to one of his Honor's questions you enumerated a number of factors. A. That is right.
- Q. I noted that you did not include the time of day worked as a factor; was that consciously done? A. Yes, sir, it was consciously done.

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Philip Taft-For Defendants Cross.

Q. Don't you think that the time of day worked is a factor which enters into the rate of pay which is paid per hour? A. If I may qualify my answer, when we speak of a rate of pay we have reference to the basic rate that is paid for a job. Then if a person works other hours, and he usually regularly works other hours, he is usually or at least frequently, though there are many cases right here I have a number of cases where the shift differential was denied completely because it was not industry practice, and the difference between working 4 to 5 and 6 to 7 is not fundamentally different. There is some disturbance to family life for which a person receives a slight compensation, but it is not any different. If you are a carpenter you do the same work. The content of your job is pretty much the same. There is some slight difference, but you are not doing a different job.

Q. Do you think that the time of day when the work is performed enters into the mind of the workman in determining whether he will accept a job at a given rate of pay? A. Why, of course, most anything is likely to.

Q. Is that a particular factor? A. I would answer your question, yes.

Q. May I ask you now, Professor, to apply his Honor's term of old-fashioned economics, whether the question of supply and demand has any bearing upon the rate of pay after 5 p.m. in the stevedoring industry, in your opinion! A. I would say this, that the supply and demand factors in the stevedoring industry, that is the supply of labor and the demand—the demand for labor, of course, is influenced by the fact that after a given hour the differential is very high. In other words, employers are not likely to demand as much labor at \$1.50 as they would at \$1, and that is actually the purpose of that. Now, the supply of labor I should say is not appreciably affected. In other words, you can get as many people to work, and

if you get different shifts, as you do in manufacturing, you very likely could get people to work for a very slight increase in their daily rate. The demand for labor is very much influenced, I would say; by the fact, and that is exactly the intention. It is to discourage the demand for labor at those periods. That is the purpose of the time and a half.

Q. Do you know that there has been testimony from no less an authority than Mr. Ryan in this case—were you in court, by the way, when he testified A. No, sir.

Q. There has been testimony by Mr. Ryan, here, who is the president, as you know, of the International Long-shoremen's Union? A. Yes.

Q. That the men never wanted to work nights.

Mr. Taylor: Well, I think that is stretching it a little bit.

Mr. Goldwater: Shall I find the record for you?

I will find it for you.

The Court: Well, what is the difference?

Mr. Goldwater: Page 221. "Men objected to working outside the normal daylight hours", is Mr. Ryan's statement.

Mr. Taylor: That is not what you said.

Mr. Goldwater: That is what Mr. Ryan said.

Mr. Taylor: Yes, but what you said he said is not what you just read.

The Court: Very well; now that we have the quotation, what about it? Put your question?

Q. And did you, in the study of the conditions in this industry, Professor Taft, learn that the companies which paid the freight also did not want night work? A. I can very easily understand why the company would not want night work, and the company does not want—

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Philip Taft-For Defendants-Cross.

Mr. Taylor: He has not asked you that.

Mr. Goldwater: I do not know why you should object to his making his answer as broad as he wants.

Mr. Taylor: All right, I move to strike out the

answer as irresponsive.

The Court: Only the person who asks the question may move to strike out the answer as not responsive. I will demonstrate to you by a simple logical proposition, that otherwise it does not mean anything, because if you will strike it out he will then ask the same question and get it responsively.

Mr. Taylor: O.K.

Q. And did you learn as a fact that the employers did not want night work; is that right? A. Yes.

The Court: Because of the penalty provision!

The Witness: That is correct.

The Court: In the absence of the penalty provision they preferred night work, so you testified earlier in the day.

The Witness: That is right; and, moreover, on this point the union imposed a penalty in order to prevent night work, in order to discourage it, and I suppose when Mr. Ryan was talking he was talking—

Mr. Goldweter: I object to the witness telling what he supposes.

The Court: Objection sustained.

The Witness: 'I am sorry.

Q. Did you mean that in the absence of the penalty provision the companies would prefer night work? A.L. did not say prefer. I would say this, that if you remove the overtime provision, and in view of the fact that it is

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to the interest of any employer to have his work done as rapidly and as expeditiously as possible, that you would encourage people, employers, working at night. Otherwise there would be no point in imposing that provision.

Q. Now, let' me ask you this, Professor. Here is an industry in which the men did not want to work nights, and that condition—the witnesses for the defendants have testified-has existed, you might say, almost from time immemorial in the industry, for 60 or more years; and in which, because of what you call the penalty provision, the employers did not want to work nights; and in which, as you say, the purpose of the penalty provision was to discourage and to inhibit night work. Can you explain to me now why, after 60 years of these continuing conditions, all of them, night work has persisted in this industry! A. Well, night work and overtime work takes place in every industry, despite the opposition of both the men -now, when we say the opposition of the men, it usually means perhaps a majority of the men. There are people that are willing to work unlimited hours, and those barriers are erected against them working and against the employer working them at straight time rates.

Now, every industry has occasions where certain jobs have to be done. There is a certain amount of work that has to be gotten out, irrespective of cost. There are some occasions where a small amount of work will free a vessel. There are all sorts of reasons that arise why overtime must be done. In other words, while it will normally discourage work, there are occasions where unless it were done the employer would suffer great losses.

That is the reason, sir, that overtime is never prohibited. Even in the most stringent type of union clause on that question there is always a qualification that overtime will be worked with the permission of the business agent, and upon proof that an emergency existed. I know of no

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single contract where it is absolutely prohibited, and that certainly would be a very foolish clause, I would say.

Q. Do you know of any contract which provides, as this one does, and has for many years, that night work must be worked at the direction of the employer? A. Yes, sir.

Q. Will you tell me which ones? A. I have a contract here. I cannot put my finger on it. I did not anticipate your question—where it states that if the employer requires overtime work it had to be done. Overtime has to be performed when he wants it under emergency conditions.

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Q. How many such contracts have you found in your examination of, you said, I think, about 300 cases? A. Well, I have looked over more than 300 contracts.

Q. In connection with this study? A. I would agree

with you, sir, that not many.

Q. How many, do you know? More than the one which you mentioned? A. Let me put it quite generally; several.

Q. Are they all in the same industry? A. No.

Q. What industries are they in? A. One I ran across I think is the carpenter's contract; another one a warehousing contract, and the others I do not recall, but I will grant that there were not many.

Q. Do you think you could find those during the recess hour! A. I could only find one, the others I do not have

with me.

Q. Will you find that during the recess hour? I should like to see the contract if you have it. A. All right, I will try.

Q. Did you learn from your study what the average year-in and year-out, month-in and month-out run of the mill percentage of hight work was to the total amount of work in the stevedoring industry in the port of New York? A. I did not do that directly, but I kept in touch

with that job, so I know it largely through the work of Dr. Smith.

Q. What did you understand it to be? A. 17 per cent.

Q. Did you understand that the percentage, whatever it might be, continued almost uniformly for the last 20 years or so? A. I do not understand that, but I can say -I do not know that. It has not been told me.

Q. There has been testimony to that effect here. A. Well. I was not here.

Q. Will you assume that. A. Yes.

Q. Will you assume that which I tell you was the tes-

timony here? A. Well, I accept it.

Q. Tell me whether you think now that the purpose of inhibiting this night work was served by the rate required to be paid, the penalty rate as you describe it? A. Yes, I do. I regard that as a very small proportion of the total work.

Q. Do you know who has to foot the bill for that extra compensation that is paid for night work? A. I presume the employer.

Q. You mean the stevedore? A. Or the shipping company

Q. There has been testimony that that extra cost is passed on to the shipping company, and that is without 1155 contradiction here. Do you know that it has been established by the defendants in this case that no night work can be done without the permission obtained by the stevedoring company from the shipping company? A. I will accept that as a statement of fact.

Q. Would you say, then, that under those circumstances there is or is not night work done, depending upon the profit which the shipping company can see by measuring the cost of the night work against the cost of permitting its ship, which is its instrument of earning, lying idle in the port! A. Why, of course that is the whole crux of the

problem, but it seems to me that when you increase the rate 50 per cent what you are trying to do is to make night work as unprofitable—for example, if a company has two hours of night work and by clearing the ship it wilf be enabled to save in time and in earning power an amount larger than the cost of working these people these two hours, of course the ship would go; that is the only test of any economic decision. It depends on comparing whether a person makes a particular economic decision; in doing so is dependent upon his comparison with his costs in one situation with his revenue or with his costs in another.

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Q. That is in the last analysis what dictates whether there shall or shall not be night work? A. Of course that is what dictates it, and the union has attempted to make it expensive by imposing this penalty rate. I would agree

with your contention.

Q. And you would say that in spite of the fact that the ultimate objective was to inhibit night work, which in its logical conclusion is to do away with night work, that notwithstanding the fact that it has continued almost unabated in percentage over a period of 20 years, this penalty, as you call it, has served its purpose? A. I certainly do, because under other circumstances the amount of night work would be appreciably decreased.

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The Court: You mean increased!

The Witness: Increased; because after all you have the ship tied up, and certainly the company would have to bear its costs, which would be the same at any point. There would be no reason why the company should not work the men around the clock if the penalty were removed.

Q. Is that so, Professor! Are you sure that there are no other considerations! A. Well; I don't want to be too cynical, so I don't want to say that people are cruel and brutal, and that there are no—

- Q. Oh, no. I am talking of the material considerations, not these abstract things that you are describing now. A. Of course efficiency may not be as high under some conditions.
- Q. Oh. And accidents may be higher? A. Well, they might, but whether they are or not of course is an empirical question.

Q. You would not agree then with your bible here, Mr. Barnes, would you! He thinks it is not empirical at all. A. That was in 1915.

Q. Oh, I see. Well, is there anything else that is antedated or outmoded in this book? A. I quoted an historical statement, that is all that I did. I did not—

Q. I see. Not as authority for the fact which the statement described. A. Well, I don't doubt that what he said was true in 1915.

Q. You don't doubt that the statement you quoted was true?

Mr. Taylor: Which statement are you referring to Mr. Goldwater?

The Court: There is only one question. You have it in the record.

Mr. Goldwater: I think the witness understands.

Q. Don't you!

Mr. Tayolr: Oh no. Mr. Goldwater is referring to a statement that the accidents were greater—
The Court: That we have not heard yet. There is only an intimation that such might appear in the book.

Mr. Taylor: That is all right. I wanted to get across to you and the witness that he still was not—Mr. Goldwater: The statement is that at night all these dangers are increased; the light is less adequate, the signals are not so readily understood;

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Philip Taft-For-Defendants-Cross.

there is usually a weariness from the day's work just passed; men are likely to relax their usual caution, and so on and so on.

Q. You understood what statement I was referring to, didn't you, Professor! A. Well, I will again repeat that

I accept that statement as true in 1915.

Q. Then you will accept the statement only as true in 1915 and not as true now, with respect to round-the-clock operations? A. Yes, sir, and if I may be permitted—I don't know whether I am in order or not—the reason that I say that it may be true in 1915 and not now is because there has been very substantial developments in safety in the last 30 years. For example, compare the accident record of U. S. Steel in 1915 and in 1945, and you will receive a very, very substantial difference. So I won't challenge the statement in 1915, but I must say that I don't know about 1946.

Q. Have you examined the accident record of this industry in 1915 and compared it with 1946? A. No, I have

not, sir.

Q. You don't know anything about the incidence of

accident in this industry? A. No, sir.

Q. Or the reasons for your opinion of the accidents in this industry, or the incidence of it, technological or are they inherent in the work itself! A. Well, I don't know the magnitude of accidents! I am sorry, but I can't answer your question, and I am not trying to evade. I just don't know.

Q. Now you said, Professor, in your testimony yesterday, that you examined a number of cases, 300 or so, if

I recall. A. Of contracts?

Q. Yes. I am not clear whether you meant contracts, separate contracts that you examined, or whether you were talking of various industries. Will you clear that up

for me? A. With respect to what, sir? I don't understand your question.

Q. With respect to the studies that you made in preparation for you testmony here. A. Oh, I examined contracts in other industries. May I say that I always look at them, but I made a special point to examine them with respect to the overtime provisions.

Q. Now, how many industries were covered by these 300 cases? A. Well, I don't like to make a guess. I looked at most of them in the Littauer Center at Cambridge, Massachusetts, and I grabbed out a batch of con- 1166 tracts and looked for the overtime provision and the hours provision, and I never really made a note of them. I looked over these particular contracts and I enumerated the particular industries they covered.

Q. When you say you looked over these contracts, I don't know which ones you are referring to. A. I am referring to these that I have right here (indicating).

Q. Those that you have with you here now? A. Yes. I looked over these and some additional ones that did not have the particular-

Q. How many of these contracts have you here with you now! A. Well, I don't know.

Q. Oh, roughly. A. Well, there are about 20.

Q. What industries do they cover! A. Well, I enumerated them.

Q. Are these the ones— A. I enumerated what they covered. I will do it again.

Q. All right. A. They cover the carpenters, the lithographers, steamfitters, sheet metal workers-

Q. Was that the list that you gave us this morning? A. Yes, that is exactly it.

Q. All right. A. Some of them are duplicates, that is, they are in the same industry, in the same trade.

Philip Taft-For Defendants-Cross.

The Court: We will suspend now until 2.15.

(Recess to 2.15 p. m.)

AFTERNOON SESSION.

PHILIP TAFT, resumed the stand.

Cross Examination continued by Mr. Goldwater:

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The Witness: I have these two, I found two, and I believe there is another one there which indicates that, sir.

The Court: Two contracts?

The Witness: With overtime having—one is clear, and the other has a requirement of work at a specific time.

The Court: That is in response to Mr. Gold-water's request before the recess.

The Witness: Yes.

Q. That was at my request that you find the contracts in which there was a provision that overtime should be performed at the direction of the employer! A. That is right. This is a requirement that certain hours have to be worked at the request of the employer, but they are not defined.

Q. To save time, do you mind if I have these looked at by one of my associates while we are proceeding!

A. Fine.

Q. My attention has been called to the fact that I may have misunder tood your answer to one question or assumed an incorrect answer to one of the Judge's questions in my follow-up, and I would like to point to the question involved and see whether I understood you correctly. A. Yes, sir.

Q. Did you say that you found one case in which the shift differential was more than 15 cents or that you found no case in which the shift differential was more than 15 cents? A. No. I said that I found one case, I stated that I believe yesterday too, that it was the lumber case in which the shift differential was defined as more than 15 cents.

Q. My question was this morning; and you had reference then to the instance of the lumber case which you mentioned yesterday. A. Yes, that is right, sir.

Q. I recall the lumber case distinctly. A. Yes.

Q. Now will you tell me whether is a point at which the ration of the time worked which is not in the regular or normal day at a rate fixed, whether there is a point in the rate at which you would say that that determined whether it was overtime or shift differential? Do I make myself clear? A. Yes, sir, I believe I understand the question. As I understand your question you are asking whethere there is a specific point at which the character of a rate would be changed, that is a difference in the rate, would be changed from a shift differential to an overtime rate. Is that the question you ask?

Yes. A. Well, I should not like to be too precise and say that this here point (indicating), as soon as you reach this point, for example, you are within the city limits of an overtime rate. I don't believe I would be prepared to say that. I would seem to me that the test is largely general experience and general practice, and may I say that that is about all that one would say. If the difference is small there is a presumption that it is a differential, shift differential. If the difference is large, there is a presumption that it will tend, or the purpose of it is to inhibit work. And then, of course, unless there were a preponderance of evidence in the contrary direction I would stick to those definitions.

Q. There is no point then at which you could say that the presumption is irrebuttable! A. In the absence of any other evidence I would agree with that. But I would say that in every case other evidence would exist.

Q. Well now, let me take the example which his Honor

gave you in one of his questions. He asked you to assume a day rate of a dollar, a night rate of \$1.10, and he asked you would you call that shift differential. You did not ask for any other facts there. You said, definitely, "differential." That was your answer in that case. Do you want to modify your answer in any way! A. No, sir. I would say that in view of the fact that normally that small difference in the rate can be offset by the spread of overhead as a result of greater operation, I would be inclined, unless there were very important or significant evidence to the contrary, to assume—if you gave me only those facts, as I have said, those facts certainly would not exist without other facts; I would assume that it is a rate differential. I stick by my answer.

Q. Your answer did not encompass what you are now saying. You did not in answer to his Honor's question say that you wanted the other facts surrounding the case. You answered promptly, "shift differential." I am asking you now whether you want that answer to stand that way or is this later explanation to be considered a modification of that! A. Well, I don't believe it is a modification because I cannot conceive of a situation where a rate of wages stands by itself. In other words, there are other considerations; you have to consider the other facts. And the other facts would be trying to determine: Is there a shift! For example, if there were no shift at all.

The Court: Supposing you had a wage scale which said 40 hours a week at a dollar a week anything over 40 hours \$1.10 a week! Would you

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call that overtime or would you call it shift differential?

The Witness: Well, there are no shifts there? The Court: No shifts.

The Witness: And, then, if the industry were of such character that a 10 per cent increase in labor costs was sufficient to inhibit work, I would have to regard it as overtime. If it were of sufficient importance. But our experience indicates that normally it is not of sufficient importance.

Q. Now, are you talking of the facts and circumstances of the particular industry in that examination to determine whether it is a shift or overtime or are you talking about the general circumstances of industry? A. I would say that it would be true in general, and experience demonstrates it is true particularly.

The Court: Suppose you had an industry which could well afford to pay \$1.10 an hour but the men are only moderately organized, and the best they have been able to get from their employer is an agreement calling for a dollar an hour for the first 40 hours, and there is a provision that for all-hours in excess of 40 the employer shall pay \$1.10, that that is the result of a strike of 30 days duration, and finally that is what they agreed on. What do you call it then?

The Witness: I think that would be an overtime rate, providing of course the change the effect, had no—the increase in rate had an inhibitory effect or tended to have that. I believe with your example it would be an overtime rate.

Q. Now you said that apart from the lumber case the

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highest shift premium pay that you knew of was 15 per cent. A. 15 cents.

Q. 15 cents, I mean, per hour. A. That is right.

Q. Do you know of the situation in the baking industry in this area? A. I do not, sir.

Q. Will you assume now that in the baking industry contract in this area the pay for night work at 25 cents per hour? A. Over?

Q. Over the regular day rate.

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The Court: What is the regular day rate? If it is 50 cents that would make it a 50 per cent ratio.

Mr. Goldwater: I appreciate that, your Honor.

Q. You talk in terms of premium per hour when you speak of 10 or 15 cents per hour; isn't that so? A. That is right; 10 or 15, or 15, 10 per cent; something like that Yes.

Q. Well, will you assume that in the baking industry in this area the A shift—

Mr. Taylor: The what! Mr. Goldwater: A shift

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Q.—which has not the regular daily hours of employment pays 30 cents per hour and that the rate per hour for normal work is approximately a dollar. What would you say as to that pay? Is that overtime or is that shift premium?

. Mr. Taylor: May I inquire whether this is based upon a factual situation or an assumption?

Mr. Goldwater: It is based on an assumption

I have said so. I said "assume that."
The Court: A hypothetical case.

Mr. Taylor: It is purely a hypothetical case.

A. I am sorry, sir. I did not follow your question.

Q. Will you assume that the rate of pay per hour for day work is approximately one dollar, and that A shift for other hours of employment in the 24 hours of the day has a premium of 30 cents per hour. Would you call that overtime or shift premium? A. Well, my answer there would be that you are approaching the twilight zone between the two types, the two types of premiura or differential.

Q. Now, that is what I wanted you to tell me, where that twilight zone is, either in percentages or in cents 1184 per hour with relation to what you might call the basic day rate. A. Well, I would say that as you begin to approach the 50 per cent premium you are approaching an overtime rate. We derive it from the fact that overtime rates are generally at time and a half and that shift premiums seldom come within a very large area of approaching 50 per cent. Now, I should not want to excludeevery case, but certainly it is conceivable that special conditions may be met in a special manner. But I would say that when you approach a 50 per cent premium you are approaching the overtime rate, a very definite overtime rate.

Q. Well, now, when do you begin to approach it, according to your definition; in the scale of between one cent or one per cent, if you wish, up to 50 cents or 50 per cent? A. Well, I don't think I could answer that precisely.

Q. Well, as a matter of fact you continuously approach as you increase 1 per cent from 0 up to 50, don't you? A. That is right, you are approaching. But the question then is you have two types of compartments, and when are you in one and when you move out of that into the other compartment?

Q. That is what I am asking you to tell me, Professor.

A. Well, I have attempted to say that the idea of overtime is to inhibit, and generally 50 per cent is regarded as adequate to act as a means of deterring work out of regular hours. There are occasions where a double time penalty has been imposed, because it was found that the time and a half rate was not sufficiently effective. That is about as well as I could do:

Q. Well, in the case in which a 50 per cent rate was not found to be effective, would you still say that the 50 per cent was overtime? A. I would be inclined to say it was overtime unless I could see a considerable amount of evidence there and the actual existence of organized shifts.

The Court: Professor Taft, if you were a physical scientist instead of a social scientist do you think that your thinking might have moved in an entirely different direction on the basis of the data that you have assembled, and thinking in terms of physical as opposed to sociological factors and in physical terminology would you not say that every premium is a force or factor composed of two—what do you call them—vectors; one to constitute the element of excessivity and one to constitute the element of abnormality in terms of time, and that the net result is a composite of the two, the relative proportions depending upon the circumstances that you have just described?

The Witness: I would just like to add one point. I agree to that, sir, but in the question of shift differential it seems to me it is important to recognize that the extra compensation is offset by the employer in terms of higher operating rates, where the overtime rate is that high, where the spread of his overhead is not adequate, will not compensate him for that extra payment, he increases his labor.

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cost to a greater degree than he decreases his overhead, and in the case of a true differential you have the very opposite result:

By the Court:

Q. Well, I agree with you. We must always assume that if we are dealing with economic assumptions, that they would not engage in overtime unless there was profit in that operation as well. A. That is right. The difference is, of course, that all conditions are not foreseeable or controllable, and economic events take place independently of the individual to some degree.

Q. Sometimes industries operate at a loss? A. That is right, and he has to make allowance in order to hold his customers, or because something has happened.

Q. But he feels that as an overall picture it is desirable for him to persist rather than to abandon? A. That is right, rather than to lose his business or trade he will stay there, but as a normal operating circumstance that will not be valid.

Q. After you said that you agreed with me, with my analogy to the physical sciences, but would not it lead you to quite different answers in specific situations, which I think you can see if you apply the specific illustrations. For instance, in the case of a man who works out of time, but only the established total of hours, the factor there of excessivity would be zero, and the factor of time abnormality would be 100 per cent. In the case of a man who works the stipulated regular hours and in addition works hours in the overtime period, there you would have both factors involved; that is, both the factor involved in working at the wrong hours, and the factor of working excess hours, the unions desiring to curtail both. A. That is right.

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Q. Then you come to the reverse situation, where a man works all abnormal hours and then works overtime during normal hours; that is, a man who regularly works at night, but then, when his overtime comes along he works during the day shift, that can happen, too; and there you would have 100 per cent abnormality and possibly a minus quantity of the other vector, or at least zero. You would have excessivity for his overtime period without any abnormality in time for his overtime period. Might nowthat result in different answers as to whether a particular premium was paid as a shift differential for overtime, and might not your answer be in many cases that it is a composite of both! Let me just follow up with one more question. Isn't it really historical association which has resulted in treating as one such factors as working over 40 hours or as working over 50 hours, or whatever the stipulated week may be, and such factors as working on the 4th of July and Christmas! A. Yes, but the premiums introduced, sir, are designed to prevent people from working at those times when the majority do not wish to work.

Q. That is right. A. You have a 4th of July premium, because the great majority of people do not want to work the 4th of July, but there are people who do, and if they worked they might make it impossible for the others to enjoy their holiday for competitive reasons.

Q. I can follow all that. A. Yes.

Q. But I say isn't it really historical? In the facility of expression it is easy to say in a contract that for work on 4th of July, New Year's Day and Christmas, and for working over 40 hours a week there will be time and a half, but that actually you are dealing with different situations. You are dealing in once case with a desire to moderate the amount of work, perhaps to spread the work, perhaps to increase standards of living, and in the

other case you want to do something a little different.

A: Well, I would say that the drive behind the various limitations that have been imposed for that have differed throughout our history. In one case, just as you stated, you have the desire to improve standards; and in the other to spread work; but the means by which that is different seem to me to have been uniform.

Q. The penalty payment? A. The penalty payment; that is right, sir.

By Mr. Goldwater:

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Q. Now, Professor, will you tell us why, from your investigation in this industry, there is now still night work in the industry? A. Well, I believe I have already stated it, that these are unusual situations. When an employer compares the losses that he would undergo by having a ship lay over with the losses, or with the increase in his expenditures as a result of overtime payments, he, if he were acting purely as an economic man, would take or make the decision which would either yield the highest returns or yield the smallest losses. In other words, he is carrying out his business. Those are the motivations for all business, and he is acting as a business man. If he cannot arrange his work to eliminate that factor at times he has to pay overtime.

Q. And where that overtime, as you call it, this pay at a different rate for a time not worked in what you describe as regular day hours, continues over a long period of years, is that an indication to you that work at those abnormal hours is a regular incident to the character of the business in which he is engaged? A. I would not go that far, because you find overtime in the construction industry. The only industry that can eliminate the possibilities of overtime is a round the clock industry,

with three shifts, and even that would not be able to for its maintenance people.

Q. Do you find it in the construction industry with the same degree of regularity over a period of 20 years as you find it in this industry! A. Quite frankly, I do not have the figures for the construction industry. I know that the overtime is worked there.

Q. You do not know whether you find it with the same degree of regularity? A. I do not know.

Q. Then it is not a comparable situation? I mean, do you think that you should cite the industry in which you have no figures as a comparable situation? A No, I was not citing the industry for the purpose of indicating that it had the same ratio of overtime to straight time. I was simply indicating that industries cannot control their overtime work, except within limits. They can within limits, and that differential is designed to control it within limits, not to prohibit it. There is no industry that prohibits overtime, that I know of.

Q. You do not know the figures in the construction industry which you have mentioned? Do you know the figures in any industry in which there is overtime at the same degree of regularity as you have found it in this stevedoring industry? A. No, sir. As a matter of fact, while I know that overtime exists—otherwise it would not be written in the union contracts—I could not tell you the amount of overtime that is worked in any industry, because I do not know and it would be a difficult problem to procure figures upon.

The Court: You are a considerable distance away, I think it is, from 7 or 7(a). I do not know how much further you want to go from that.

Mr. Goldwater: I do not want to get much further away from it, your Honor. The witness's

answers compel me. in searching for his reasons for definitions to ask further questions.

The Court: Tdo not want to curtail your examination.

By the Court:

Q. Do you say, Professor, that the economic factor of establishing a 50 per cent benefit for a period of work in excess of a stipulated period is to discourage employment during that extra period! A. Yes.

Q. And you would also say in the converse that in order to discourage employment for that extra period you have to impose a penalty! A. You have to impose a

penalty, yes.

Q. You are familiar with the Wage and Hour Law, I take it? A. Yes, I am reasonably familiar.

Q. And the statute is designed to accomplish that economic effect? A. Yes.

Q. To discourage employment in excess of 40 hours by imposing on employment in excess of 40 hours an

employment charge! A. Yes

Q. Supposing you have a situation in which an employee working at night for 40 hours a week gets paid X rate; how do you accomplish the desired discouragement from having him work an additional 10 hours, or having the employer employ him for an additional ten hours, unless you impose a penalty for a certain extra period? A. I would say that normally that condition of a man receiving time and a half over the first rate is not likely to exist.

Q. Supposing you find that it does exist? A. Well, I would say that he was receiving the overtime rate due to this fact, that the concept of overtime—

Q. I will agree with you, he is receiving the overtime

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pay for the entire 40 hours, and apparently his employer finds it satisfactory or economically desirable to employ him and pay him the overtime rate for the 40 hours that he works. Now he wants to employ him the 41st hour, and you now have to call into play a restrictive force; isn't that true!

Mr. Taylor: May I ask how often you are assuming this thing happens?

The Court: Once.

Mr. Taylor: Oh, just once.

The Court: That is all we are talking about. A man works 40 hours a week at the abnormal period of time, so that is getting time and a half for each hour of the 40 hours. Now he has worked the 40 hours. He works an additional ten hours. Now your problem is to inhibit or retard or discourage the employer from employing him an additional ten hours. How do you do it?

Mr. Taylor: I object.

The Court: On what ground?

Mr. Taylor; On the ground that the question of what may be done in a particular instance of that sort, the answer to that sort of a question on that sort of a hypothesis is not going to assist us any in solving our problem here. Our problem is how frequently do you have night work of that character going on, and what is the thinking and purpose of the parties with respect to its frequency.

The Court: No, I am assuming that the only plaintiff here was one plaintiff who was operating en an individual employment contract.

Mr. Taylor: For one week?

The Court: For one week, or for one year, I do not care, under which he gets \$1 an hour and \$1.25

for day work and \$1.875 if he works after 5 o'clock, and it so happens he always worked after 5 o'clock, or for a period he worked after 5 o'clock, so that he actually has been collecting \$1.875 an hour. Now here is what I want to get, a Congressional construction: That is what I am asking this question for. Assuming Congress wants to discourage employing that man for a period beyond the first 40 hours, what would an economist advise Congress to do!

Mr. Taylor: I object. I think it is a conclusion for the Court and not the witness. I think you are posing purely a legal question.

The Court: I will reserve decision on your objection and let him put the answer on the record.

The Witness: Well, your Honor, I believe that your question is very unrealistic, because I cannot envisage, economically speaking, a situation of that kind arising.

Q. Supposing you were told that in this record situations of that kind exist, then you would have to say that it is not utterly unrealistic? A. That is true, sir.

Q. Supposing you assume, as I think the evidence may 1209. show, that some longshoremen always work at night, never work by day. A. I think that I would conclude from that, sir, that the condition was an abnormal one, and that where it existed there were either some special circumstances or some very unusual situations, and I think that I would still be inclined to retain the concept of overtime that has been developed, over a long practice, that overtime can be defined in these two terms, which I have done.

Q. If I am going to translate your answer to try to make it responsive to my question, you tell me whether I am right, would you say that in order to accomplish

this inhibiting force you would not need any further penalty! A. I believe that sir.

Q. In other words, you are suggesting that under those circumstances no further discussion is necessary, that there is a discouraging factor in every minute of work! A. I believe, sir, that in view—the time the law was enacted, and I have no right to say that in the courtroom but I believe that the idea was to spread employment, and a condition of this kind, if it existed there would be no need to inhibit further restraint on employment.

1211, By Mr. Goldwater:

Q. Professor, I would like to call your attention to the situation which his Honor asked you to assume this morning, a situation in which an industry had a rate of pay, a fixed hourly rate of pay, and in which there was pay for more hours than the hours actually worked; do you recall his Honor's question!

The Court: I do not recall it.

Mr. Goldwater: Your Honor assumed a case, or I asked the witness to assume a case in which there was pay at, we will say, eight hours for six worked.

The Court: If I am thinking of the same example that you are thinking of, I assumed that the contract stipulated six hours as the normal day, but actually the intention of the parties was to work eight hours, it being the intention of the parties that the employee should earn for the eight hours a day.

Mr. Goldwater: I think your Honor added "the intention of the parties" to the question. I do not say that your Honor did not say that this morning. I say your Honor added it to my present question, the "intention of the parties."

The Court: You want to eliminate that !. Mr. Goldwater: No. I am perfectly willing to leave it in.

Q. Do you recall the question? A. Yes.

Q. In answer to that you said you knew of no case? A. I believe that I answered that it would constitute a disguised wage increase.

Q. But you know of no such case? A. I believe that the Pacific Coast Longshoremen industry may fall in it. I did not think of it at that time, but I was not trying to

hide it. I just did not recall it, at that time.

Q. Do you happen to know of the Pacific Coast air frame industry case! A. I remember the case very vaguely. I remember that it was a very important case before the War Labor Board, and I do not recall the details, but I may if you refresh my memory.

Q. Perhaps I can refresh your recollection. A. Yes; all

right, sir.

Q. You recall that that was a case in which for hours outside the regular hours there was a 10 cent per hour premium, which was in addition to eight hours pay for 61/2 hours work?

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Mr. Taylor: I do not think that is an accurate statement.

A. I do not recall those details, but I am not questioning you.

Q. Well, we will try to find it. A. I may have it.

Q. Are you familiar with the Monthly Labor Review? A. Yes, certainly. I probably have it myself, but I will accept your question, sir.

Q. I will ask you to look at this statement in the Monthly Labor Review, on page 346 of the August, 1944,

issue, Vol. 49, No. 2.

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The Court: Have the record show it was published by the Department of Labor.

Q. Have I correctly quoted the terms! A. That is right.

Q. I have? A. That is right.

Mr. Taylor: I merely want to make sure that if this witness be interrogated on the assumption that that contract is of a certain character, that Mr. Goldwater tell him all of the essential ingredients of the contract. One is that you have a true situation and regularly established shifts—

The Court: When you are dealing with a witness as expert as the witness we have on the stand, I allow counsel very much more leeway in not stating such facts, on the assumption that the witness is able to fend for himself, and if there be some factor there which is omitted, that the witness will call our attention to it, but should he fail counsel is always there to back him up on redirect. That is a Siegfried Line behind which we never withdraw.

Mr. Taylor: This is not supposed to be a hypothetical question. This is supposed to be an actual case, and it is not improbable that the witness might be influenced by the assumption in the question that he is being given an actual case.

The Court: The witness looked at the record. If that factor is important the witness will, of course, call our attention to it.

Q. Professor, I am unable to tell you at the moment what the hourly rate of pay is. But can you tell me, apart now from the 10 cents per hour which would indicate a percentage of the regular rate per hour, or the rate

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for regular hours, we will say, what the translation of 8 hours pay for 61/2 hours work would mean, just that element, in terms of percentage?

The Court: In terms of percentage?
Mr. Goldwater: Yes.

The Court: You want to know the mathematical answer. Ask one of your associates to ascertain it.

Mr. Goldwater: I have done it.

The Court: What is the percentage!

Mr. Goldwater: It is 23 per cent; I am told.

A. Let me elucidate on that question. It seems to me that there is one issue that I should like to answer, and that is, first of all, that there are two shifts. Now, the situation there seems to me to be very simple. It is difficult to get people to work in that industry; a high labor turnover. 10 cents was given for the second shift. Now, that in itself is a very high shift differential. It is 2 cents above that—the maximum suggested or ordered by the Stabilizer for the third shift. Now, therefore, if you are going to get people on the third shift, if you give the second shift 10 you have to give something to the third And there you really have the thing working out in the same way as an ordinary two shift.

Q. So you have indicated that the difference between the second shift and the third shift is 23½ per cent. A. Well, in that case—

Q What does it compensate for? A. Well; the one thing compensated for was the disarrangement, and actually it was due to the difficulty to get men on a third shift because of the large absenteeism and labor turnover on the Pacific Coast. That really explains the very sharp shift differential there, sir.

Q. Well now, is that all the explanation you wish to

make in respect to that? A. That is all I would say, that this is a special case and it is due to the very difficult labor situation in the Pacific Coast area; and the difficulty in getting people to work on off-shifts.

Q. Now you mentioned a moment ago the possibility of the Pacific Coast shipping or longshoremen working on the Pacific Coast being an example of the payment of more hours pay for less hours work; did you not? A. I

do not believe I have that in mind, sir.

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The Court: What did you intend to illustrate

when you mentioned the Pacific Coast?

The Witness: Well, the question was asked whether there are examples where an overtime rate is set and the people as soon as they are working they will not quit at the end of their straight time but the employer will have to allow them to work two hours. And I recall, which I did not do this morning, that that was the condition on the Pacific Coast. And to me that appears more in the nature of a disguised wage increase.

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Q. You were not then referring to the Pacific Coast shipbuilding industry! A. No. no. I thought of the longshoremen.

Q. Do you know of a differential in the Pacific Coast shipbuilding industry? A. I do not have it right here. I

may have it in my notes.

- Q. Well now will you assume that in the Pacific Coast shipbuilding industry in 1943 there was a 15 per cent differential for work done outside of the normal work days as you have described them and 8 hours of pay for 7 hours of work? A. Yes.
- Q. And will you assume that my mathematics is correct, and that that indicates a 31 per cent increase of pay for

the hours worked outside of the normal hours. What would you call that, overtime or shift differential? A. I think that shifts existed there. It was a shift differential.

Q. I would like to call your attention to the Monthly Labor Review, July, 1943 issue, volume 57, No. 1, pages 142, 143, under the heading "Shipbuilding Industry." A. Yes, sir.

Q. The top of page 1943 reads as follows, in a short paragraph: "The Pacific Coast agreement establishes a 10 per cent differential and allows 8 hours pay for 71/2 hours work for the second shift and establishes 15 per 1226 cent differential and 8 hours pay for 7 hours work on the third shift." A. I would answer this, especially on the second shift, it is not uncustomary where there are rotating shifts to allow, or three shifts let me say, either three shifts or non-rotating or rotating shifts, to allow a half hour for lunch on company time. And that is what is there. That is not unusual on shifts because the men are working at a given time and they are allowed that. That situation, while it is high, while the differential is high, still seems to me to have the character of a shift differential because there are shifts there, and there is a differential between the first and the second, and the second 1227 and the third.

.Q. You would not say then that in this case you were approaching that mythical point where you could differentiate between shift and overtime! A. No, because there are other reasons to explain it, why it is a shift differential. The labor conditions, the difficulty in getting people on the second and third shifts. And may I say that that is precisely the reason why the shift in the lumber industry was so high, the shift differential.

Q. I would like, before I forget it, and his Honor may. or may not have covered it this morning; I hope if it has been covered you won't think I am trying to drive the

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point home, but I want to be sure that the answer is in the record: Do you know of any other industry in which there are three shape-ups or the equivalent of three shapeups a day! A. I do not, sir.

Q. I would like to refer you again to your testimony of yesterday, Professor, which you have gone over so many times today, just as background for my following questions: I would like to call your attention to Mr. Taylor's question as to the purpose of overtime and your answer, the substance of which was that it is an attempt to impose economic sanctions or an economic penalty upon the employer so as to discourage him from continuing work at either certain periods or after a certain number of hours have been worked. You were then asked what was the history of the development of that concept, and if I am not mistaken all of your answers today have had that concept at the very basis of your reasoning, have they not? A. Yes.

Q. Now, after an objection and the Court's allowance over my objection your answer was as follows:

"Well, the demand for shorter hours by organized labor is one of the first demands that have appeared in our industrial history. Early in the 19th Century, and even at the end of the 18th, when labor first organized, the demand for the reduction of hours made its appearance, and several justifications were developed, and those have been, with changes to suit the different times, have been used throughout our history."

Now, here are the reasons that you gave:

"First it was customary to work very long hours in industry, 12 and 14 hours a day, and we have what

is called the citizenship argument, the demand that a free citizen must have leisure time so as to be able to exergise his franchise intelligently."

Now, that reason would pertain to hours of work of an individual, would it not? A. I do not precisely get the question, sir.

Q. Well, perhaps I should make it clearer. The reason which you have given would pertain to continuing hours of work of a man who had worked the normal day's work?

A. That is right.

Q. The next reason that you gave is: "Then you have the development of the idea that a reduction of hours"—will lead to better productivity. That undoubtedly pertained to the individual again, the individual workman, does it not? A. That is right. They will be better workers.

Q. I beg your pardon! A. They will be better workers and more efficient.

Q. The individual who worked shorter hours will work more effectively? A. Yes.

Q. And thus there will be greater productivity, is that right? A. Yes. That was one

Q. That was what you meant by that reason? A. That was one of the important arguments given for the reduction of hours.

Q. That again pertains to the reduction of hours after regular hours of employment, does it not? A. Oh, no, sir. The regular hours of employment changed and what makes them change is the demands for people for shorter hours. The regular hours of labor are not static; the regular hours of labor were 12 at one time, 14, 10, 9, 8, 40. When you speak of the attempt to reduce the hours beyond the regular hours of labor, I must demur there. It is an attempt to change the regular hours of labor.

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Q. All right. When the hours are 14 and there is pressure to reduce the hours to 12 in terms of this reason which you have given, it is because you want or claim that you will get better productivity if a man working 14 hours is required to work only 121. A. That is so.

Q. The reason therefore pertains to the hours of work

of the individual? A. Of course; that is right.

Q. Then you have the development of the idea that a reduction of hours is needed to eliminate or minimize different types of employment. A. Unemployment, sir.

Q. Unemployment. Maybe technological unemployment.

A. That is right. It is the work sharing argument, the work-sharing argument I put it.

Q. That is the same as what you would call the lump of labor? A. Well, I suppose the two things are tied to gether. People believe that there is a certain amount of work, and therefore you reduce the hours of labor and you pass it around among more people. I do not say that most economists would accept it. But that was the drive ing force. That is right.

Q. Do you accept that theory? A. No, I do not accept it. But I believe that it has been a very, very important and a very significant reason or driving force behind the shorter hour movement, the consciousness by labor that there is a limited amount of work and that unemployment is ever present. I hope I don't have to give the reasons why I do not accept it, your Honor.

The Court: No.

Q. I would like to ask you one final question, Professor. Mr. Nolan who was a member of the negetiating committee for the Shipping Association testified here (p. 156):

"Q. What is the purpose of overtime in the industry!

A. The purpose of overtime"—there was an interruption,

and then he continued—"well, I would say basically to get the benefit to its membership of increased income when and if they are called upon to work outside of the regular or straight time hours prescribed in the agreement."

Would you agree? A. I would not, sir.

Q. Would you agree that the history of this industry as you have stated it indicates that that is a correct answer to the question? A. No, sir.

Q. You would not? A. I would not. I would disagree.

Mr. Goldwater: That is all.

The Court: Professor Taft, let me ask you this question. You have expressed the view that the overtime involved in the I.L.A. contract is what you call true overtime—

The Witness: Yes, sir.

The Court: And not a shift differential.

Now, supposing we take the I.L.A. agreement and make some revisions in it, revisions in language, taking care, however, to produce the same dollars and cents effect. Then I want to ask you whether, assuming you read an agreement of this type which I am about to formulate, your view would still remain the same.

Suppose an agreement, instead of providing for three shapes a day said there shall be three shifts a day and to provide that the first shift should be in effect from 8 in the morning until 1 at noon, and the second one from 12 noon—isn't it, until 12 to 1?

The Witness: Yes.

The Court: The second shift should be in operation from 1 until 5, and the third shift for whenever the third shape is in effect.

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Mr. Taylor: When does it end? The third shift begins and ends where?

The Court: When does the third shape begin!

Mr. Taylor: 6:55.

The Court: 6:55, and runs for 8 hours beyond that.

Then suppose it provided that the rate of compensation for shift No. 1 shall be \$1.25 an hour for the first 40 hours and \$1.87½ an hour for all hours in excess of that, that the wages for shift No. 2 shall be \$1.25 an hour for all hours up to 40 and \$1.87½ for all hours in excess of 40 hours, and that the rate of compensation for the third shift shall be \$1.87½ period.

was presented to you for examination and you were asked to state whether the rate of compensation specified for the third shift constituted a shift differential or whether it constituted compensation for overtime, what would your answer be?

Objection? No. All right.

Mr. Taylor: No, I know the answer. I mean, the answer to the objection.

The Witness: Certainly the distinction between the first and the second shift would be clear. A 25 cent—

The Court: They would be exactly the same. The first and the second shift I provided the same rate of compensation.

The Witness: Oh.

Mr. Taylor: \$1.40 for the second shift.
The Court: Oh, I did not mean to. \$1.25.
Mr. Taylor: I thought you said \$1.40.

The Court: No. \$1.25 for the first and \$1.25 for the second.

The Witness: Certainly.

The Court: The question I want you to fix your mind on is, what would be your opinion in the light of your professional competence as to whether the premium provided for the third shift constituted a wage differential or overtime compensation?

The Witness: It is 50 per cent, isn't it, sir!

The Court: That is right. But the language of

the agreement is as I have revised it.

Mr. Taylor: And all the customs in the industry are just the same.

The Court: Everything else exactly the same. The only difference is the language which I have incorporated into this agreement.

Mr. Taylor: Well, of course I do object because I do not see how you could assume that any such agreement would ever come into being, into existence, in an industry, the nature and characteristics of which as you know; it just doesn't fit into anything that is realistic according to the evidence in the case.

The Court: I am not aware that I have changed any working condition or working circumstance: all I have tried to do is to change some language in an instrument.

Mr. Taylor: Yes, but the language in an instrument is never unrelated to the practices in the industry. It always makes sense in one way or another, and the sort of arrangement which you have assumed here, in my opinion, if I may say so, respectfully, could not have been possible when you had the type of situation that we know you had here in this port. It is so completely irrational that you can't draw anything other than irrational speculations on it. 1244

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The Court: Do you find anything irrational in my having drafted an instrument for the particular industry that I assume—

The Witness: Being an economist I don't use

such strong language, your Honor.

The Court: Oh yes, that and stronger language.
The Witness: No. I never do. I never even speak that way to my students, and I certainly would not to your Honor.

The Court: I am just a free student in your

course today.

The Witness: No. I don't find it irrational, but I would simply say certainly it is not irrational, an assumption is not irrational because it is a perfectly reasonable assumption. But I would say it is unreal, it is unreal in relation to the industry.

The Court: When you say unreal you mean that it could not be with those words used in the con-

tract!

The Witness: No, I feel this; here is why I believe it is unreal, because first of all it sets up shifts which in themselves are dependent upon a certain type of regularity, and secondly it sets up a shift differential which normally for the normal operation of an industry, if there are not such factors as difficulties of labor recruitment, would be excessive, it seems to me.

The Court: Assuming nevertheless that this document were drawn by a lawyer who is unfamiliar with the longshore industry and consequently did not use the terminology of the longshore industry—

The Witness: I would have to say, sir, that as you set it up you have set up a shift differential.

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The Court: A shift differential?

The Witness: I think so.

The Court: Very well. We will take a short recess. And I will see counsel in the robing room.

(Short recess.)

DAVID ALOYSIUS McCABE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

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- Q. You live in Princeton, New Jersey? A. I do.
- · Q. You are on the faculty of Princeton University?
 A. I am.
- Q. Will you please tell the Court about your education and experience bearing on your qualifications as an expert in this case. A. I studied labor relations during my graduate work at Johns Hopkins University, in preparation for the Ph. D. degree. My doctorial dissertation was written on the subject of the standard rate in American trade unions, and that was subsequently published in 1912. I published a book with Professor George E. Barnet of Johns Hopkins University on "Mediation, Investigation and Arbitration in Industrial Disputes", in That book grew out of some work I did for the United States Commission on industrial relations in 1914. and 1915. I prepared a report on that subject of governmental mediation in labor disputes with Professor Barnet, a report that was submitted to the Commission. have studied collective bargaining in the flint glass industry in particular many years ago. I made that study, and made a report on collective bargaining in the flint glass industry for the United States Commission on Industrial Relations.

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I also made a report for that Commission on collective bargaining in the general ware division of the pottery industry, and one on collective bargaining in the santary ware division of the pottery industry, and I subsequently published a book on national collective bargaining in the pottery industry.

I also published a book, in collaboration with Professor Richard A. Lister on Labor and Social Organization. That was in 1937 or 1938, I forget which. I have written articles on labor relations and the law of labor relations, that have appeared in a number of different journals of proceedings.

Now do you wish me to mention those!

Q. No, I think that is enough. You might tell us what your department is, and your subjects, at Princeton University. A. I am one of the professors of economics. I give courses in what are called there labor problems for undergraduates, and courses for graduate students, also in the general field of labor organization and collective bargaining, and also in the field of labor legislation.

Q. How about service on any panels or arbitration committees, or boards? A. I was chairman of the Newark Regional Labor Board under the National Labor Board in the days of the National Recovery Act. I was chairman of that board in 1933 and in 1934. After September of 1934 I was a public member of the Philadelphia Regional Labor Board. I served as an industry committee member of several different industry committees under the Fair Labor Standards Act. I have acted as an arbitrator on nomination of the National War Labor Board. I have also acted as a panel chairman under the Regional, Second Region Board, for New York and New Jersey, of the National War Labor Board. I have acted as an arbitrator on occasions for the New Jersey State Board of Mediation, and I have acted as an

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arbitrator in a number of cases at the request of the parties, at their choice.

Q. Professor McCabe, what was meant by the term "overtime" in American industry prior to the Fair Labor Standards Act!

> Mr. Goldwater: I object to that as immaterial and irrelevant.

The Court: I will allow it.

A. The term "overtime" was applied to time worked beyond a given number of hours, or outside a specified 1256 schedule of hours, including hours on specified days, such as Sundays, in some cases Saturdays, and holidays. The term was also used for the amount that was paid for working those hours designated as overtime.

Q. How long has it been used in that sense! A. The term "overtime"?

Q. Yes. A. The first case that I recall of the use of the term "overtime" in this country was by the iron moulders, in their 1876 convention. They used that term in a resolution of the convention. I think, though I am not sure, that it was used earlier in Great Britain, but I did not find the term in general use in this country in the 1880s. That is, I have gone over reports of that period, and statements in articles of the early 1880s, in which the term "overwork" was still in use, but I find in the reports, for example of the New York Bureau of Statistics of Labor in the late 1880s and early 1890s. I find the term used there rather generally.

Q. What was the purpose of overtime?

Mr. Goldwater . Objected to upon the same grounds.

The Court: I will allow it.

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A. The purpose of the overtime rate was primarily to discourage the working of the overtime hours.

Q. How prevalent has the use of overtime for that purpose been in the country prior to the F. L. S. A.?

Mr. Goldwater: I object on the same grounds.
The Court: Overruled.
Mr. Goldwater: Exception.

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A. As I understand the question, it has to do with the degree of prevalence of overtime pay before, let us say, 1938. My impression is that it was confined very largely to organized trades, and the degree of organization of American workers down to, let us say, 1933, was not high, so that over American industry generally the overtime concept, as I have used it here, was not general My impression is that in unorganized industries it was not the general practice to pay men a much higher rate for so-called overtime hours.

The Court: Any higher rate? You say much higher rate. Was it customary to pay a premium at all?

The Witness: I do not think it was, your Honor, The Court: All right.

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organized trades, as, for example, in the building trades, in some of the metal trades, in bituminous coal, in the clothing industries, and this is not intended to be an exhaustive statement of the list of organized industries in the United States, the practice of demanding and receiving overtime rates was generally followed; but in 1936 and 1937 there was a very great expansion of union organization, and with it went a very great expansion

of the practice of paying overtime rates under union contracts.

Q. Without going into too much detail, could you illustrate by some references or examples the attitude of the unions in the use of the overtime mechanism to accomplish the union purpose?

> Mr. Goldwater: Objected to as immaterial. The Court: I will allow it.

A. You wish me to give an example of the use of the evertime rate?

Q. Yes, just to clarify it and show how it was used? A. For example, in 1890 there was a bricklavers' and masons' agreement here in New York City that stated the regular-I am going by my memory. I can look it upthe regular hours of labor as, let us say from 7 to 12. and 1 to 5, and required that all other hours be paid for

at double time. I have here a number of such contracts. Q. Well now, will you tell us a little bit about the relation between the total weekly hours and an accepted or normal regular working day of so many hours per day in connection with the general labor movement in this country! Is my question clear to you! Evidently it is not. A. You wish me to talk about the weekly hours or the

daily hours, or both?

Q. I assume, Professor, it has been part of the union purpose to reduce the total number of hours which union members work during the week, and what I want you to tell us about is the relation between that group, that objective, and the fixing of a normal and regular working day of so many stated hours in each day. A. The earliest organized movements for reductions in working hours were, as I recall it, stated in terms of the working day. For ex-

ample, the movement for the ten-hour day among such

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labor organizations as there were in the 1820s and 1830s. The limitation of the working hours to ten a day would be almost automatically the fixing of a weekly limit of 60 hours, because in those days it was not customary to work on Sundays. It seemed to be generally accepted that Sunday was not a working day. Consequently, if you limited the hours of labor to ten a day you would be fixing a 60-hour week. Does that answer your question?

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Q. It does in part. I also wanted you to say what there is to be said about the difficulty of policing an agreement to the effect that the parties could not work more than so many hours a week, unless as part of the arrangement the hours to be worked during the day were also fixed, and you might tie that in particularly to an industry like the longshoremen's industry. A. Well, in the case of the 10-hour movement frequently they set what the hours would be, but not always. By that I mean what the starting hour should be and what the quitting hour should be. Then they provided in some cases for the payment of a higher rate for the hours in excess of a particular number or the hours after a particular clock hour.

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As early as 1853, I think in Cincinnati, the organized printers established a rate of what they called price and a half for work beyond certain hours. That practice was followed more and more as time went on.

And so far as the longshore industry goes, the first account that I have seen of requiring payment of higher rates after a specified hour in the evening and before a specified hour in the morning was the statement in Barnes' book with respect to the year 1872. I believe that was cited here this morning, because I recall furnishing a copy of the book.

Q. I don't think I have quite gotten across to you yet, Professor McCabe the particular thought I had in mind

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If a contract merely provided that men should not be worked more than 10 hours in a day, without stating the time during the day when those 10 hours should be put in, but merely imposing a limit of 10 hours at straight time, do you see, wouldn't there be some difficulty; particularly in a casual industry, to see whether or not employers were taking advantage of individual workinen and working them more than the permitted 10 hours, unless it was fixed by the clock that everything betweencertain hours was straight time and everything outside of those hours was overtime? A. Yes, that has appeared in some industries. If-let me start again, please. If it is to the advantage of the employer to have a variable starting time according to the particular circumstances of that particular day, the men would be exposed to being worked to an unpredictable hour. That is, the quitting time would be variable and unpredictable in advance for the men and their wives unless the quitting time was fixed and some means of enforcement or discouragement provided against running the working day past that particular hour. In other words, under those circumstances, the union would have to aim at controlling not only the number of hours but the clock hours within which that number of hours was to be worked. Have I made that clear?

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Q. I think so. Will you tell us whether or not the overtime practice concept has been adopted in legislation in this country prior to the Fair Labor Standards Act? A. Yes.

Q. Will you tell us about that and amplify your answer a little bit, please? A. The first case I recall was the amendment to the old 8-hour law.

The Court: The Adamson Act!

The Witness: The Adamson Act of 1916 provided that 8 hours should be the standard for work and pay but it did not fix the rate for overtime.

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A. The unions had asked for time and a half and the President, as I recall it, in his suggestions to Congress suggested that the principle of the 8-hour day be recognized by enacting a basic or standard 8-hour day and leaving for later determination, after report by a Commission, the question of whether the overtime rate should be pro rata or more than prograta.

Does that answer your question, your Honor?

The Court: Yes.

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A. (Continuing) Shortly after that, or it might have been about the same times Congress amended the old 8-hour law to permit the President to declare a state of emergency which would leave the prohibition against the contractors working men more than 8 hours; in other words, the President could proclaim a continuing emergency. And by legislation, as I recall it, it was also stipulated that time and a half should be paid for those overtime hours. There was a piece of legislation having to do with customs inspectors in 1920 in which Congress provided for the payment of overtime to inspectors who worked in overtime hours at the expense of the vessel, as I recall it.

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The Court: That is right.

A. (Continuing) The next one of any consequence that

comes into my mind is the Walsh-Healy Contract Act of 1936, and that fixed on contracts for Federal supplies I believe over \$10,000 a maximum of 8 hours in one day and 40 hours in one week. But provided that the Secretary of Labor should be authorized to exempt from this provision on condition that time and a half be paid for the overtime, and the Secretary of Labor almost as soon

as the Act was passed, as I recall it, issued a blanket permission to work overtime under those conditions.

There may be others, but if there are I don't recall. There is state legislation. There is the famous Oregon 10-hour law which used the time and a half overtime provision for an emergency three hours of o ertime.

Q. Was there a customary or usual overtime rate? A.

Was there a usual overtime rate?

Q. Yes.

Mr. Goldwater: Objected to as immaterial.

The Court: I will allow it.

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A. I would say yes. I would say time and a half, although there was before 1938 considerable double time, particularly in the building trades.

Q. Was there any distinction in industry generally between overtime, meaning work in excess of a stated number of hours, and overtime, meaning work outside of an approved or normal work day?

Mr. Goldwater: That is objected to as not being relevant to this industry, and immaterial.

The Court: I will allow it.

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A. The term overtime has long been applied in American industry to both types, to work in excess of a specified number and to work outside of stated hours or days.

Q. Are you able to give the Court some idea by referring to particular types of contracts or particular industries as to illustrations of contracts where overtime meant work done outside of the normal and regular work day! A. Why, I have some here.

Q. Are there a substantial number of them? A. Yes. The contract is general in the building trades of stating

the regular day in terms of clock hours and then adding all other hours are overtime. Sometimes it is stated this way, that time between 4.30 or 5 in the evening and 7.30 or 8 in the morning shall be considered overtime and paid for, and the usual rate in the building trades is double time. Of course, there is the overtime rate in many industries for Saturday as such and for Sunday as such and for specified or named holidays as such. But this practice of stating what you might call overtime rates for night hours, this practice is not confined to the building trades. You find that generally in the building trades, you find it to some extent in the metal trades, that is machinists and boilermakers, blacksmiths, moulders and foundry men, and you find it in scattering other industries. And I wouldn't say that there are many industries in which it is the general practice. But particular contracts can be found in a number of different industries.

Q. What is meant by a shift differential, Professor McCabe? A. A shift differential ordinarily means a differential rate of bonus paid to the workers for working in second or third shifts as distinct from the ordinary

regular or daytime shift.

Q. Is there any difference in purpose between the shift differential and overtime? A. Yes.

Q. What is it? A. The purpose of the shift differential as commonly used is permissive; it is permissive and compensatory. Whereas the purpose of the overtime rate is to discourage the working of the overtime hours.

Q. Can you state that there is any general normal relationship between straight time pay during one shift and the amount paid in succeeding shifts; in other words, how big do shift differentials normally run?

Mr. Goldwater: Objected to as immaterial. The Court: I will allow it.

A. Let me say, sir, that the shift differentials, as I recall it, were not a general practice in American industry before this war or between World War I and this war. I should say that the usual rates on shift differentials were 5 cents an hour or 5 per cent for the second shift and 10 cents an hour or 10 per cent for the third shift. Those were exceeded in particular cases, especially during the war.

Q. How much does the shift differential ordinarily run?

A. Well, a couple of years ago I should say that it was 5 cents or 5 per cent for the—5 cents an hour or 5 per cent added to the hourly rate for the second shift, and let us say 10 cents or 10 per cent for the third shift. Those are the figures that stick in my mind as usual.

Q. Have you ever known a shift differential as high as 50 per cent? A. As high as 50 per cent?

Q. Yes. A. No, sir.

Q. Will you trace for us in general terms, Professor McCabe, the history of overtime rates in the longshore industry? A. I will do that, using the term overtime rate retroactively, if I may, your Honor.

In 1872 in this port the men got a rate of double for the overtime hours. There are reports—I have not been able to verify them fully—there are reports that time and a half was paid in New Orleans as early as 1870. I have seen an overtime rate of 50 per cent, that is time and a half for the Puget Sound area in I think 1886. Does that—

Q. Go ahead. Tell us about the development of the whole industry. A. The overtime rate of double time in New York for the night overtime hours was obtained apparently in—it was obtained in a time of good business, 1872. And after the panic of 1873, or shortly after that panic, the employers refused to pay the double time

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rate for hight overtime, and there was a strike on that issue and the men lost.

In 1886 there was a strike in this port that spread from the New Jersey side of the port. The Knights of Labor were involved in that strike. And demanded double time for night overtime in that strike, and they lost the strike.

And from then on the rate for night overtime, from then on, for many years the general practice, so far as I can discover, the general practice was to pay about time and a half for the night work. And to pay—I think double time was generally paid in this port for Sundays and two holidays, Christmas and the Fourth of July; but on the Jersey shore they included Good Friday.

That was the situation when the first agreement was made with the International Longshoremen's Association in this port in 1916, May of 1916 as I recall it. The night overtime hours paid about time and a half and the Sunday and holiday rate was about double time: and although the rates were increased from then on, during World War I and in the active busy shipping years before the United States went into the war, that pattern of time and a half for night overtime and double time for Sunday overtime, that pattern held as I recall it until the National Adjustment Commission, which was appointed during World War I to handle labor disputes and labor matters in the shipping industry, particularly with respect to stevedoring and longshore work; that Commission established a flat rate of time and a half and did away with the double time for Sunday. But it did give the men the 8-hour day and the Saturday half holiday. And after the war, in this port I think that shortly after the var the Saturday half holiday was curtailed, that is, to only four months. Later it was extended to

six months, May to October; and about 1926 I think it

. . .

was the men got the Saturday half holiday or the 44hour week. And that situation held pretty generally in this port down until this war.

On the Gulf where the L. L. A. had the men well organized before the war, that is in the port in which it had the men well organized, they followed pretty much the same pattern; and the National Adjustment Commission gave about the same award except that they did not get as I recall it the Saturday half holiday down there at that time.

Does that answer your question?

Q. I think so. Do you find generally then, Professor McCabe, in the history of longshoring in New York, since the time when it became truly organized through the I. L. A. about 1915 or so, the same sort of pattern, the same sort of union purpose, the same sort of objectives that you find in organized industry generally throughout the United States? A. Yes.

Q. Have you anything to suggest as to a particular reason why it is important in the longshore industry to have the contract set up on the basis of a regular day of, we will say, 8 to 12 and 1 to 4 rather than on any other basis or arrangement? A. Yes, sir. From the standpoint of the union—

Q. What is it? A. It is to put economic pressure on the employers to channel the work as far as possible into those hours of 8 to 5 and from Monday to Saturday noon; and now I understand, under the award, Friday night.

Q. Do you have sort of a definition of your own for this type of overtime that goes by the clock? Do you call it automatic overtime? A. I have called it automatic overtime and I have since changed it a bit and I am now inclined to call it "as such overtime."

Q. Perhaps we can use that expression for convenience

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from now on. I would like to ask you whether you can suggest any other reasons for the existence of as such overtime in the longshore industry? A. The first reason being that the employers are under particular temptation to vary the starting time and finishing time with the circumstances of the day.

Q: That is one reason. A. There is another difficulty from a union standpoint in this industry, as I see it, that would make it advisable to fix certain hours as straight time hours and that is that the longshoremen may move, and frequently do move, during the week from one employer to another. Now, if a man has worked we will say 8 hours on this pier and the job is finished and if he goes to work on another pier within an hour or so and works another 4 or 5 hours, frankly it might be difficult to enforce the payment of overtime if your only requirement were that overtime shall be paid to the man for hours in excess of 8 in any one day.

Now, if you say that the regular work hours are from 8 a.m. to 5 p.m. with an hour out at noon for dinner from Monday to Friday, or as it was in the old agreement for so many years, from Monday to Friday, and from 8 to 12 noon on Saturday, then anybody who is working outside of those hours is automatically working overtime.

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Q. And of course it is particularly true in this industry that men do move from pier to pier and from employer to employer? A. Yes. Frankly I do not know how much of that there is percentagewise but it is apparently frequently done. That is, a man's week, a man's week of 44 hours under the 1943-45 agreement; the man's week of 44 hours would not necessarily be worked with the same employer, it might be worked for two or three different employers.

The Court: Before you had a limitation of so many hours a week the man might conceivably work 70 hours and get only straight time!

The Witness: He might.

The Court: If there were no clock limitation.

The Witness: If there were no clock limitation. I believe that is known in social reform circles with respect to women's hours as swamping.

The Court: Swamping?

The Witness: I think that is the term applied to it, where the term does not fix hours within which the maximum hours must be worked.

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Q. Now I suppose you know, as we all do, that here in New York as well as generally throughout the country, we had different conditions in wartime from what we had in peacetime? A. Yes, sir.

Q. Is there anything in those circumstances that would lead you to change your opinion that the overtime under these collective bargaining agreements is true overtime? Is there any difference in thinking or concept of purpose between peace and war? A. Not as a long-run proposition. Certainly the purpose of inhibiting or discouraging work being the specified hours is not retained during war. For example, we had an Executive Order-I do not attempt to remember the numbers of these Executive Orders; we had an Executive Order in February of 1943 to the effect that in war industries unless you were working 48 hours a week you were a slacker. Now, that was a statement that overtime in the Fair Labor Standards Act terms, was to be worked. The Act was passed in peacetime. It was passed, if I may be permitted to say so, in what some people called a recession. Only a few years later, because of a war condition, the President of the United States practically—he urged people to work

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48 hours a week when the professed purpose of the Fair Labor Standards Act was to discourage the employment of people, the same person, more than 40 hours a week. But I would say that when that war condition passes, the primary and permanent purpose of the Fair Labor Standards Act will re-emerge. We went through—I am older than any of you—we went through this in World War I.

Mr. Goldwater: May I challenge that for myself.

The Witness: You challenge that statement! Mr. Goldwater: Yes.

A. (Continuing) We went through this in World War I. Although the Government so far as possible established the basic 8-hour day the Government, as I recall it, asked its contractors to work people more than 8 hours a day and pay them overtime at time and a half for so doing.

The Court: Do you recall the campaign on the part of some segments of industry to have the 40-hour law of the Fair Labor Standards Act changed to a 48-hour week?

The Witness: I have noticed such suggestions, sir.

The Court: Do you regard that as well advised?

The Witness: As a peacetime— The Court: No. During this war:

The Witness: Yes, yes, that suggestion was made. I considered that suggestion myself in 1940. It was proposed that not only should the President suspend the time and a half provision of the Walsh-Healy Act but that Congress should suspend—well, should suspend the coming of agreement.

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of the Fair Labor Standards Act and put it up to 48. I remember writing at the time that the question was not a question of whether time and a half should be paid for overtime but a question of when time and a half should begin. I recall that distinctly, your Honor.

The Court; Very well. Go ahead.

Q. Turning your attention for a moment to the matter of terminology, can you tell us whether or not the word overtime has been used in the stevedoring industry prior to the Fair Labor Standards Act to describe— A. Itahas.

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Q. —the work at night and on Sundays and holidays?

The Court: The answer is yes.

The Witness: Pardon met

The Court: The answer is yes.

The Witness: The answer is yes. Do you want the instances!

Q. I do. A. I don't want to take up too much time by looking through my notes here; if you will let me trust to my memory for the moment I will go ahead.

The word overtime was not in general use in American industry in the early 1880s. But in the report of the New York State Bureau of Statistics of Labor for 1887 there is an account of the 1886 longshore strike in this port. And in that account the report refers to an offer made by the Old Dominion Line to its men to pay them what it called a day rate of so much, the figures I forget, and for overtime or an overtime rate, and the Board adds in this report, "impliedly night work."

Now, within the industry itself, the employers I know used the term in 1907; the union, the I. L. A. used the term in some demands it presented to the shipowners.

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stevedores; and in the 1918 demands of the I. L. A. for the North Atlantic ports demands which were passed upon by the National Adjustment Board, the union in those demands called this overtime. It was asking for double time for overtime, and it included nights and Sundays and Saturday afternoons in that category.

Q. In other words, an examination of the collective bargaining agreements will show that in the early days they used the words "night work" or "night time" or "day work" or "day time", and did not use the word "overtime". You yourself have seen these documents! A. I have.

Q. Written currently, in which what is now called overtime was actually referred to as overtime? A. Yes.

Q. As a matter of course, and common understanding as between the unions and the employers? A. Yes.

Q. What are the documents to which you refer and where did you see them? A. The documents in the industry?

Q. Yes.

The Court: The source from which you derived this information.

A. Well, in 1907 the Shipowners Lines—I have forgotten exactly the terminology—adopted a resolution, and they adopted a memorandum to be released to the press, in which they referred to what was commonly called the night rate as an overtime rate. I think it was something like this: 30 cents day rate, 45 cents night rate; and the next document—

The Court: They called it overtime or night

The Witness: They called it both.

Q. Indiscriminately or synonymously? A. My recollection is that they used both terms, but I know they used the term "overtime".

Mr. Goldwater: May I ask at this point if the witness has the document, or a copy of it, in court? The Witness: I saw that document in the office of the New York Shipping Association, and I took some notes from it. I do not know whether I have them here or not, but I think the document could be produced.

Mr. Goldwater: Perhaps your notes will do, Professor. I might ask you to refer to those later.

The Witness: Yes. The next document from the industry to which I have referred was something in the nature of a circular which was sent to the employers by the New York District Council, I think it was called, of the I. L. A. This circular embodied what are often called, your Honor, in union circles, demands. They are requests, or possibly hopes, but they are usually called demands. These demands used the term "overtime" for the rate asked for the night hours.

The next document to which I referred is in the New York Public Library. It is a typewritten or mimeographed document, I have forgotten which, a copy of hearings that were held here by the National Adjustment Commission in 1918, and it appears in those hearings that the longshoremen in the I. L. A. made demands for the various North Atlantic ports. Although I understand that the I. L. A. did not represent Philadelphia, it made demands for Portland, Maine, Boston, New York, Baltimore and the Hampton Boads ports. These were uniform demands, and these uniform demands are referred to in the—in fact, are included in the

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record of those hearings; and in those uniform demands we have the term "overtime," applied to the rate demanded for the night hours and Saturday afternoon and Sunday. There is a copy of that document in the New York Public Library. That was the only place where I could get hold of it.

Then if you want me to go on-

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Q. No. I guess that is probably enough. That is more than enough. Professor McCabe, have you made a study of the legislative history of the Fair Labor Standards Act? A. I have.

Q. Is there any specific discussion in the legislative history of what Congress intended by the words "regular work" in Section 71 A. I have gone over the legislative history, and I have gone through the reports of the Senate and House Committees and the Congressional Record. I do not recall any discussion of that term "regular". "His regular hourly wage" was used I believe in the original bills. As I recall it, the House bill and the Senate bill were identical, with one or two minor exceptions that had to do with foreign trade or imports or exports. My recollection is the expression was "his regular pay of wages." The reports and the discussions were rather casual about it, as I recall it. Sometimes a report would say "his regular rate of pay". There were several reports. You will recall, your Honor, that the bill had a long legislative history.

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The Court: Starting with Senator Black's 30hour bill.

The Witness: In this connection I recall that in the Special Session of December, 1937, an amendment was proposed in the House and adopted by Representative Bullwinkle. He proposed that the

time and a half rate be applied also to what he called the graveyard shift, and he said his purpose was to eliminate it. One of the Representatives, Representative Ramspeck as I recall it, referred to this as an overtime rate of \$1.50. The question was what was it to be time and a half of! The House, Committee had proposed earlier, although this was never debated, that the graveyard shift be penalized by a rate of one and a half times the minimum rate specified in this bill, whereas Representative Bullwinkle's amendment was to the effect that it should be one and a half times the rate otherwise payable; and there was some discussion of that, because none of the members of Congress apparently still thought that that meant the minimum wage fixed in the bill; and it was pointed out very clearly in the case of highly skilled workers such as in the textile mills up in Connecticut, the ordinary or regular rate, that is the rate otherwise payable, would be considerably above the minimum rate to be specified in the bill.

Now that is about the only discussion in that connection that I recall. I do recall that the so-called American Federation of Labor bill, which was proposed and defeated in the Special Session, merely specified that 40 hours shall be the limit, not to be exceeded except in an emergency, and then only on payment of time and a half. It did not say time and a half of what. Now that is the regular AFL practice, time and a half.

I hope I have not gone into this too far.

Q. Professor McCabe, are there any facts or circumstances to which you might direct the Court's attention, which indicate, or tend to indicate, that Congress intended to exclude overtime from regular pay? A. Yes, I think so.

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Q. What are they! A. In the first place-

The Court: You are now using the word "overtime" meaning night work?

· Mr. Taylor: Yes, sir.

Mr. Goldwater: I object to it as immaterial and irrelevant, and not competent for this witness to

testify.

The Court: I do not think he is testifying. I think he is arguing, and on the basis of the discussion I had with counsel in chambers I will allow it, by appointing him counsel pro hac vice, or quasi-counsel. This is strictly not testimony. He is calling the Court's attention to certain material in the Congressional Record, to which I would have access whether or not he testified to it or counsel called attention to it in a brief. So it might be helpful; so go right ahead.

The Witness: I am not sure of the position, your Honor. Am I asked whether Congress intended to exclude overtime, or am I asked whether Congress intended to exclude overtime in the sense of time

outside regular hours?

The Court: That is what he should have asked you.

Mr. Taylor: Yes.

The Court: The latter question.

The Witness: I have no basis for answering that question.

Mr. Goldwater: I object to your Honor's construction of the question.

Mr. Taylor: I nodded my head.

Mr. Goldwater: I did not see him, and I do not think the stenographer could. I am sorry.

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The Witness: The only basis that I would have on that, that is, whether Congress intended to preclude overtime in the sense of overtime, in the sense of hours outside of a regular schedule?

Q. Yes. A. The only basis I would have for arriving at any judgment on that is in connection with this Bull-winkle amendment again. I recall no suggestion or intimation ther that when the House adopted this amendment it intended that if people who were employed in the graveyard shift should be employed for more than 40 hours in one week they should be paid for the hours above 40 time and a half on time and a half.

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The Court: You don't know!

The Witness: I don't know. I saw no reference to it.

Q. Have you any opinion as to whether overtime under the collective bargaining agreement with which we are concerned in this case is overtime in the industrial sense in which it is generally used in this country? A. My opinion is that it is—

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Mr. Goldwater: I would object.

The Court: I will allow it. The question has been answered several times by other witnesses. Go ahead.

Mr. Goldwater: I have already objected.

The Court: And I have always overruled the objections.

The Witness: My opinion, your Henor, still is it is overtime in the same sense.

Q. What are your reasons for saying that?

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The Court: All his previous testimony constitutes the reason for that decision.

Mr. Taylor: Well, all right.

The Witness: The purpose of it, and it is in conformity with a rather wide practice in other industries.

Mr. Taylor: Your witness.

Mr. Goldwater: I think, in view of the fact that the testimony here is largely cumulative and repetitious of the testimony given by the witness Taft, that no purpose can be served by taking hours of covering the same ground again.

The Court: There would not be any purpose. There is no law that makes cross-examination compulsory.

Mr. Goldwater: And I will say to Professor McCabe I am also indebted to him for information, and I have no cross-examination.

The Court: You are excused, sir.

(Witness excused.).

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(Short recess.)

Mr. Taylor: If your Honor pleases, before calling my next witness, Mr. Liddy, a Deputy Collector of Customs, here in court, I would like to call your Honor's attention to certain statutes with which you may or may not be familiar, which I think you should have in mind in order to fully appreciate the quality and effect of the testimony.

The Act of February 13, 1911, as amended by the Act of February 7, 1920, which you will find in its amended form in United States Code, Section 267; provides in part as follows. This is Section 5:

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo'.

Then omitting a portion, it continues:

"such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading. unlading, receiving, delivery or examination takes

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place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel; Provided, further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the. overtime pay herein fixed."

I would like to call your Honor's attention also to Sections 401, 450 and 451 of the Tariff Act of 1930, which you will find in the Code, Title 19, Sections 1401, 1450 and 1451. Omitting certain portions, I call your Honor's attention to the fact that in one of these sections which is involved with the definitions, the following is the definition of "day":

"Day.—The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian."

Section 450 says:

"Unlading on Sundays, holidays or at night.

"No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe."

Section 451, which follows, relates to what is called "Extra Compensation", and contains this sentence:

"Upon a request made by the owner, master, or 1328 person in charge of a vessel or vehicle, or by or on behalf of the common carrier or by or on behalf of the owner or consignee of any merchandise or baggage, for overtime services of customs officers or employees at night or on a Sunday or holiday, the collector shall assign sufficient customs officers or employees if available to perform any such services which may lawfully be performed by them during regular hours of business, but only if the person requesting such services; and the said section 451 is further amended by adding at the end thereof the following: 'Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at nights or on Sundays or holidays when such assignments are in the public interest."

Then you may also wish to look at the Customs regulations of 1937, Article 1242, relating to extra compensation for overtime services. Section 1462 (d) says that the act of February 7th, 1920, the one I first called your attention to, also provides "that in those ports where customary working

Frank J. Liddy-For Defendants-Direct,

hours are other than those above mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said port".

FRANK J. LIDDY, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

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Direct Examination by Mr. Taylor:

Q. Where do you live, Mr. Liddy! A. 7006 Colonial Road, Brooklyn, New York.

Q. You are Deputy Collector of Customs of the port of New York? A. I am administrative assistant to the Collector of the port of New York.

Q. How long have you been connected with the Customs service, Mr. Liddy! A. Since July 1, 1904.

Q. And what have been your duties and experience during that period? A. Well, for a period of five years I served as a clerk within the building, which would bring me up to about 1909. Thereafter I served for a period of 25 years as an inspector of Customs daily on the waterfront, on steamship piers, concerning myself entirely with supervisory operations over the lading and unlading of vessels in so far as Customs operations were concerned.

For two years thereafter I served as a staff officer, which necessitated my going down the bay on the Revenue cutter and boarding vessels at Quarantine, and performing certain preliminary Customs operations with the view of expediting Customs matters after we arrived at the pier. And thereafter I would work on different piers for hours, until such time as my requirements were completed.

For a period of two years thereafter I served as Deputy

Surveyor of Customs, in charge of all the steamship piers in District 5, North River, which, geographically speaking, extended from 42nd Street to Poughkeepsie. That would necessitate my daily proceeding to every pier in that district, investigating the conduct of the business that was performed by our Customs people, looking into the requirements of the steamship companies in connection therewith.

For a year and a half thereafter I served as Deputy Collector in charge of the international participation at the New York World's Fair.

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Thereafter I was appointed Administrative Assistant to the Collector of Customs on August 1, 1940, which position I now hold. I am allegedly the trouble shooter of the department; wherever anything goes wrong, either inside or outside the building, it becomes my duty to inaugurate investigations and effect such remedies as I am able to do.

Q. I wish you would tell us a little bit about the relation between the unloading of vessels, that is the actual handling of the cargo, and getting it out of the ship and on the pier, and the protection of the revenues; that is, what the inspectors do and whether they do it when the stuff comes out of the ship or when it goes off the pier; what the relation is between the Customs service and the unloading of vessels?

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Mr. Goldwater: I object to that, your Honor. I think this would be very informative and instructive, but I cannot see the relevance or materiality to the issue that is being tried here.

The Court: Will you justify the question, Mr.

Taylorf

Mr. Taylor: Yes. The witness will testify that the normal and usual working day in the port of

Frank J. Liddy-For Defendants-Direct.

New York is 8 to 5, and that if anyone wants to bring a vessel at any time other than that he has to get a special license and get an inspector up there and pay him the overtime rates.

And the question occurred to me, as one that might occur to the Court, as to whether it would be possible for the ship to be worked at night in the absence of the inspector, and that is all I am trying to get at.

The Court: All right. I will let him develop it briefly.

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A. Well, two inspectors are assigned to supervise the operations of very vessel upon arrival, and it is the inspector's duty to see that that cargo at the time of its discharge is placed upon a pier within certain confines, and in a certain manner, such that all Customs formalities may be expeditiously thereafter effected. In a word, it must be placed in a weighable condition, it must be placed in a gaugable condition, it must be placed in a measurable condition, it must be placed so that it may subsequently be expeditiously delivered. That necessitates the inspector's performing certain physical operations. should be out on the pier a good deal, he should be up on the vessel; he will want to know what cargo is coming out of which hatch; he will want to be sure that it is not being removed from the proper confines of that pier; he is interested somewhat in the movement of the steamskip personnel, of the longshore personnel, of everybody that has any business around that pier having to do with the removal of that cargo, if he is properly alert and discharging his duties properly.

Q. I think you have answered it very well, Mr. Liddy; but the precise point I am trying to get at is whether or not the operation of unloading a vessel coming from

a foreign port with dutiable cargo on her can go on in the absence of a Customs inspector! A. It may not properly go on, it may not legally go on, it may not go on without the parties in interest first having made an application to the inspector to perform certain physical activities after the conclusion of the normal working day. In a word, a vessel may come up to any port within the port of New York between the hours of 8 a. m. and 5 p. m., and after the captain has proceeded to the Custom House and made proper entry, or prior thereto if his broker has secured what is known as a preliminary entry, the vessel may practically automatically go to work so far as the Customs are concerned on that particular pier, because we have men stationed on all piers, and we have facilities to cover their operations. In a word, the business setup is such that we can't be obstructive, and we must be ready and waiting and permit them to start to work providing they come to their regular piers.

The Court: If no inspector is on the pier can the unloading of a vessel take place?

The Witness: Lawfully a vessel may not discharge except under the supervision of a Customs officer. That is, providing she is in the foreign trade.

The Court: In the foreign trade? The Witness: That is correct.

Q. Now then, Mr. Liddy, you are familiar with the 1911 statute and the 1920 amendment, are you not? A. Well, I am familiar with its effect upon Customs personnel, yes, and its application.

Q Is it true that in this pert if a ship wants to come in and discharge after 5 o'clock at night, or Sundays or

Frank J. Liddy-For Defendants-Direct.

holidays, they have to apply for and get a special permitf A. That is correct.

Q. What are the customary working hours in the port of New York for loading and unloading of cargo coming from abroad? A. 8 a. m. to 5 p. m.

Q. How long has that been so? A. Since 1911.

Q. Now are there any places—A. I would like to qualify that now, before we get any further. When I started as an inspector in 1909 the hours were from 7 a. m. to 6 p. m., and shortly thereafter, to the best of my knowledge and belief in or about 1911 they were changed from 8 a. m. to 5 p/m. In 1909 they were definitely from 7 to 6.

Q. Now it is stated in one part of the statute that in ports where customary working hours are other than 8 to 5 the Collector of Customs is vested with authority to regulate the hours of Customs employees so as to agree with the prevailing working hours in the ports. Will you tell us whether or not the Collector of Customs of the port of New York has exercised that power with respect to any port of entry within the port of Greater New York that is, within his jurisdiction?

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Mr. Goldwater: That is objected to as immaterial and irrelevant, your Honor. It has no bearing on the issues that are before you.

The Court: I will allow it.

Do you understand that the question is limited to ports within the port of New York?

The Witness: That is right.

The Court: There is more than one.

The Witness: That is District 10. We have the port of New York and three sub-ports, Albany, Perth Amboy and Newark. The hours in each and all instances are from 8 a. m. to 5 p. m.

Q. How about LaGuardia Air Field? A. In LaGuardia in view of the fact that-

The Court: Do longshoremen work at LaGuardia Pair field?

The Witness: They have labor. I wouldn't say longshoremen. They have labor.

The Court: Are any of them within this type of case that we are dealing with?

Mr. Taylor: No. The point I want to make, sir, is that at LaGuardia Air Field, which is within the jurisdiction of the Collector, who has authority to vary the working day when in fact the customary hours are different, he has at LaGuardia Air Field set up three shifts of eight hours each because there is a 24 hour normal day there.

The Court: All right.

Mr. Taylor: But he nevertheless retains the 8 to 5 along the waterfront.

The Court: I will allow him to answer.

Mr. Goldwater: If that is the purpose of the question I object on the ground that they pertain to the shifts of government employees under a stat- 1347. ute which has no application to the case at bar.

The Court: Very well. I will allow it.

In LaGuardia Field you have what?

The Witness: We have what is known as three platoons, three shifts of inspectors. One group starts at 8 a. m. in the morning and works until 5. taking an hour out for lunch from 12 to 1. We have a second group, who come to work at 4 and who work until midnight. We have a third group who come to work at midnight and work until 8 a. m. the following morning.

Frank J. Liddy-For Defendants-Direct.

The Court: Do they get the extra compensation that the statute contemplates, those that work on the second and third platoons?

The Witness: No, there is no extra compensation in connection with their activity except under a recent statute there is a 10 per cent differential. The Court: That is not the statute to which we

have been referring.

Q. They do not get any overtime under the 1911 or 1920 statute! A. Absolutely; there is no application of that in this situation at all, your Honor.

Q. On the waterfront, that is in connection with the services of inspectors in the loading and unloading of vessels, what is the practice where an inspector who has not been employed during a particular day between 8 in the morning and 5 in the afternoon, for example where it is his day off and he is assigned to go on duty on the waterfront at or after 5 p. m.; does he or does he not receive the overtime under the 1911 statute?

Mr. Goldwater: Objected to on the same grounds, that it pertains to a Federal employee whose compensation is governed by a different statute.

The Court: Objection sustained. If you want to put the answer on the record you may, under 43(c).

Mr. Taylor: The answer would be that that

The Court: Let him tell us.

Q. What is the answer? A. He would be paid overtime under those conditions.

Q. The overtime which is paid by the Collector whenever it has been earned under the 1911-1920 statute, is billed by the Collector to whom? A. To the party in

Frank J. Liddy-For Defendants-Cross.

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interest. The steamship company for whom the inspector would have rendered service would have to pay the charge. The individual naturally may handle no money and the transaction is handled by the Collector.

Mr. Taylor: Your witness.

The Court: Are you going to examine this witness at all?

Mr. Goldwater: Yes, I have a few questions.

The Court: I was just thinking that this might be as good a time as any—

Mr. Goldwater: I can finish with him before 6 o'clock, I am sure. I have only a few questions. The Court: Go right ahead.

Cross Examination by Mr. Goldwater:

Q. I would like to ask you first whether a Customs inspector whom you have described shapes up at particular hours of the day and, if so, how many times in the day? A. He reports to a station, whatever it may be, at 8 o'clock in the morning.

The Court: Every morning?
The Witness: Every morning.

The Court: He is on regular work? The Witness: Correct, your Honor,

Q. And he works regularly every day for a compensation paid by the year! A. Correct.

Q. In other words, he has an assured annual compensa-

tion? A. Definitely.

Q. Whether a ship is in port or not? A. That is correct.

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Mr. Goldwater: I think that is all I have to ask him, your Honor.

The Court: You are excused.

(Witness excused.) °

The Court: We will adjourn now until-7:151 7:301 Which do you prefer!

Mr. Goldwater: I think 7:30.

(Recess to 7:30 p. m.)

NIGHT SESSION.

Mr. Taylor: I have here, your Honor, a chart which was marked Defendants' Exhibit K for identification and also a statement which has been prepared and apparently is signed by Caleb Smith, entitled "The ability of stevedoring corporations to meet a judgment under the Fair Labor Standards Act." I have not read it, but Mrs. Schleifer has been over it, and if she passes it I am sure it is O.K.

The Court: I am glad that he so entitled it.

Mr. Taylor: And, as I understand your Honor's suggestion, that may be marked also for identification?

The Court: Yes. My suggestion is that you have it marked for identification. And this is going to be tied up to your offer of proof?

Mr. Taylor: Yes.

The Court: This constitutes in effect what your witness would testify to had I permitted the examination?

Mr. Taylor: Yes, your Honor.

The Court: So that a reviewing court can see not only whether the question was good or bad but whether the exclusion was prejudicial.

Mr. Taylor: Precisely.

(Marked Defendants' Exhibit L for identification.)

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The Court: What about this chart? Are you offering that? You mentioned a chart.

Mr. Taylor: Yes. That is Defendants' Exhibit K for identification. I offer that in the same way, along with—

The Court: Oh, that has already been marked for identification.

Mr. Taylor: That is right. The two together constitute the offer of proof.

The Court: I see.

All right, call your witness.

Mr. Taylor: Mrs. Schleifer.

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MARY L. SCHLEIFER, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

Q. Where do you live? A. Washington, District of Columbia.

Q. What do you do? A. I am labor law counsel for the War Shipping Administration.

Q. How long have you been connected with the War

Mary L. Schleifer-For Defendants-Direct.

Shipping Administration? A. Since 1942, the early part of 1942; February and March.

Q. In what capacity? A. As an attorney.

Q. Covering what sort of activities and operations!

A. Primarily the field of labor law, but of course it extends into all legal activities of the War Shipping Administration.

Q. Are you in position to tell us from your official knowledge in your work with the War Shipping Administration the extent to which the War Shipping Administration took over the steamship companies during the war?

Mr. Goldwater: Objected to as immaterial. The Court: I will allow it.

A. The War Shipping Administration requisitioned all the offshore fleet early in the war. The requisition was in part on a time charge basis and in part on a bare boat charter basis, but in those two types we took over control of all the offshore shipping fleet.

Q. What is the Warshipsteve contract? A. A Warshipsteve contract is a contract between the War Shipping Administration and an independent stevedore to perform stevedoring operations on vessels which we controlled or operated.

Q. Is it true, as stated by some of the other witnesses here, that where a stevedore who is a contracting party to the Warshipsteve contract wanted to work overtime, he had to get permission? A. The contract so provides.

Q. What are the provisions of Warshipsteve contracts with respect to liability of the War Shipping Administration for the expenses of stevedoring operations, including particularly the amounts paid for wages?

Mr. Goldwater: Objected to as immaterial.

Mary L. Schleifer-For Defendants-Direct.

The Court: Overruled.

A. The Warshipsteve contract is a cost-plus contract, and includes reimbursement for all contract labor costs. Perhaps I should qualify that. It is not entirely cost-plus. I believe there is a flat rate in addition to which labor costs are reimbursed, the flat rate presumably taking care of overhead and items other than the labor costs.

Q. Under the provisions of the Warshipsteve contract the amounts paid out by stevedores for longshore wages are something for which they bill the War Shipping Administration and ask for reimbursement under the terms of the contract? A. That is correct.

> Mr. Taylor: Your witness. Mr. Goldwater: No questions.

By the Court:

Q. On the record would you define the offshore fleet; as distinguished from, I presume, the inshore fleet or the onshore fleet? A. I am not sure, your Honor, that I can do that. It is an expression that we use a great deal of the time in War Shipping Administration.

Q. What does it exclude? A. Well, it excludes the small harbor craft, such as barges, although we did have some barges under general agency agreement, and tugs under general agency agreement, but it excludes those that are locally in operation as contrasted with those which go out, perhaps beyond the three-mile limit, or something of that sort.

The Court: Very well.

(Witness excused.)

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Nathaniel Dixon-For Plaintiffs-Rebuttal-Direct.

Mr. Taylor: The defendants rest.
Mr. Goldwater: Is it proper to move for judgment for the plaintiffs at this stage?
The Court: It is proper.

REBUTTAL PROOFS

NATHANIEL Dixon, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

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Direct Examination by Mr. Goldwater:

Q. Mr. Dixon, do you work for the Huron Stevedoring Company? A. Yes.

Q. Can you tell me when you first went to work-

The Court: Is he one of the plaintiffs? Mr. Goldwater Yes, sir.

Q. When did you first go to work for Huron? A. April 23, 1944.

Q. How do you fix that date? A. On my identification card, sir, the date when I started.

Q. Is that a card that was issued to you by the Huron Stevedoring Corporation? A. Yes.

Q. Do you know what day of the week that was!

A. Yes, on a Sunday.

Q. Did you go to work on April 23, 1944, on Sunday, during the daytime or at night? A. Night shift, sir.

Mr. Taylor: I think the answer is irresponsive. The question is whether he went to work in the daytime or the night time, is it not, sir?

The Court: Yes, but I have heard no objection from the questioner.

Mr. Taylor: The question is all right. answer I object to.

The Court: You can object to it on the ground that it is immaterial, irrelevant and incompetent. You cannot object to it on the ground that it is not responsive to the question, if the questioner is content. Let me explain it again, because we have that proposition come up in two trials out of three. A question is put which is proper in form, or at 1870 least is not objected to. An answer is given which includes more than is called for by the question. That answer might be bad in the sense that if a question were put to which it were responsive the question would be properly objected to. If such is the fact, then a motion to strike is in order by the adversary. Of course, clearly you cannot sneak testimony into the record that way, but if the answer is responsive to a question which, if put, would survive the objection, then a motion to strike because it is not responsive is meaningless, because if the questioner is content with it all he would have to do is re-put the question to which the answer is not responsive and we would only be wasting time.

Mr. Taylor: I understand that, and I think the question "Did you work on the night shift" would be inadmissible and I move to strike out the answer.

The Court: I will allow the answer to stand.

Q. Whom did you see, Mr. Dixon, when you went to work at Huron that night? A. You mean how did I know about the job?

1872 Nathaniel Dixon-For Plaintiffs-Rebuttal-Direct.

Q. Yes. A. The fellow that carries my gang now, the fellow what we call the hatch boss. The fellow that is carrying my gang now, I saw him, I saw him on the street. I used to work with him before I went to the Grace Line. And he told me that he was taking a gang, that he was going to get it together, to the Grace Line, to work, and being that he knew me before, he asked me would I come along. I did so.

Q. Who was this man? A. A fellow by the name of

Horace Leighthorne.

Q. Are you familiar with the word shape-up in the stevedoring business? A. I believe so.

Q. Do you know what shape-up means? A. Yes, sir.

Q. Did you shape up at other piers besides the Huron piers? A. Previous to then, before then?

Q. Yes. A. Yes, sin.

Q. What piers did you go to and who were the stevedoring companies who operated there? A. Well, one pier was Pier 32, which is Moore-McCormick; Pier 34, Jarka; Pier 95, 96 and 97, which is Bay Ridge.

The Court: After April 23rd did you also work for these other piers?

The Witness: Well, after April 23rd I worked for Bay Ridge, yes, during the slow season.

The Court: You worked for Huron and Bay

The Witness: Yes. When we wasn't working for-

Q. Well, after April 23rd did you go for work, shape up at any of these other piers besides Bay Ridge!
A. Yes, sir, whenever there wasn't any work at Huron.
For instance, we worked two nights. There wasn't any

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work, naturally, I have a family, so I go to look elsewhere. I went to make a shape.

Q. You went to make a shape at Moore-McCormick and at Jarka at different times? A. I haven't worked at Jarka since I started on April 23rd at Huron, but I have worked at Moore-McCormick, at Bay Ridge,

Q. Did you go to the pier where Jarka operated, to shape up, since April 23rd? A. Yes, I have been there. I went there, in the daytime, but it is very hard to get work in the daytime.

Q. You went to shape up at the Jarka place; you were 1876 there in the daytime? A. Yes, sir.

Q. And didn't find any work? A. No, sir.

Q. On one occasion or more than one occasion? A. Not at the Jarka; I haven't been there but once since I started with Huron. I had been to Moore-McCormick quite a few times, mostly at night, for the simple reason that it is harder to get work in the daytime than it is at night for us.

Q. Did you go to Moore-McCormick in the daytime also? A. Yes, I have been there in the daytime.

Q. Were you able to get work there in the daytime? A. I have only once since then.

Q. When you did get work that once, was it day work or night work? A. It was day work, sir.

Q. And how many days did you work at the Moore-McCormick Line? A. Three or four days, I don't exactly remember; it wasn't a full week. Three or four days. have worked there on the night shift at Moore-McCormick since.

Q. You have? A. Yes.

Q. How many times have you worked there at night? A. I have worked a half a dozen different times, not straight; but whenever my pier wasn't working, Huron

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Nathaniel Dixon-For Plaintiffs-Rebuttal-Direct.

wasn't working. I worked there a half a dozen different nights; not in the same week, in a period of time.

Q. Now you say you are now working at Huron?

A. Yes.

Q. And are you working with a gang there? A. Yes, sir. Gang 24: Gang 24, the gang we started with.

Q. Do you know how many gangs are working at the Huron pier now, approximately! A. Night or day, sir!

Night gangs?

Q. Yes, sir. A. Well, they carry about five gangs at night now, sometimes when they are busy seven.

Q. Do you know from your working at that pier how many gangs approximately are carried in the daytime?

A. Anywhere from 18 to 26.

Q. Now is this gang 24, if that is the number you gave me, that you work with, employed regularly, continuously? A. I can't say that, sir. I can't say any gang is employed regularly. Only when there is work.

Q. Well, for example, when did you last work with gang

24 on the Huron pier? A. The last night?

Q. When did you last work? A. The last night, sir? Sunday night. The last night that I worked is Sunday night.

Q. Last Sunday night? A. This past Sunday.

Q. How many nights previous to that had you worked with that gang at that pier? A. Two nights. Sunday night was our third night of the week ending Sunday night.

Q. You worked Friday night, Saturday night? A. No, sir. We worked Tuesday night, Friday night and Sunday night.

By the Court:

Q. Did you shape up Wednesday night? A. No, sir.

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- Q. You didn't shape up? Why? A. Because we had orders to watch the board. They put the orders on the board on the outside.
- Q. So you knew there would be no work? A. Not when we left there Wednesday morning. We know that Wednesday at one o'clock, we know that gang wouldn't be ordered out.
- Q. Thursday you didn't shape up either! A. No, sir. The orders was to watch the board Friday.
- Q. Did you shape at any other pier other than this pier? A. I didn't go out myself, I didn't go out at all. 1382

Q. You just stayed idle? A. Yes, sir.

- Q. Since then what have you done? A. I haven't done anything. We had orders to watch the board yesterday. We didn't work last night.
- Q. Did you shape at any other pier but Huron yesterday? A. No, sir.
 - Q. Why? A. I just didn't go out.

Mr. Taylor: I didn't hear your answer.

The Witness: I just didn't go downtown; I didn't go out.

By Mr. Goldwater:

1383

Q. Have you tried in the past shaping up in the daytime for day work? A. I have, sir.

Q. What has been your experience? A Very tough luck, sir, in the daytime. It is very hard for us to get work in the daytime.

The Court: When you say "for us," what do you mean?

The Witness: I mean longshoremen. It is hard for the average longshoreman to get work in the daytime. I don't want to bring the subject of race in it or not, but what I mean by "us," when I say "us," the longshoremen, the colored longshoremen has a very tough time in getting on in the days. That is what I mean.

The Court: That is what I thought you meant. I wanted you to say it.

Q. Since you have been engaged with gang 24 did that gang ever work daytime? A. No, sir.

Q. And it went to work only at the 7 p. m. shape-up at night? A. Yes, sir.

1385

By the Court:

Q. wour entire gang composed of colored boys! A. Yes, sir. Up until about three months ago. We had one white fellow in the gang. We started off four colored men.

By Mr. Goldwater:

Q. For the last three months there has been one white fellow in the gang? A. Yes, sir.

how do you get that instruction to watch the board, from whom? A. The stevedore of the pier tells our hatch boss, "Tell the gang to watch the board for orders tomorrow." Always the next day at one o'clock the orders are up.

Q. Is that the regular time to look for the orders to find out whether you are to go to work that night?

A. Yes, sir.

Q. At one o'clock in the afternoon?

The Court: So you go down to the pier at one in the afternoon to see whether you are to report for work that night at 7 o'clock?

1387

The Witness: Yes, sir.

Q. Now, that is the pier where the ships of the Grace Line are loaded, is that so? A. Yes, sir.

Q. Will you give us the pier number? A. Pier 57 and

58, North River.

Q. Do I understand that you have been working now with this gang on and off, as you have described it, but more with this gang than any other work, since Sunday, April 23, 1944? A. That is correct, sir.

Q. Were you at one time in another gang, gang 30?

A. Yes, sir.

Q. How long were you in that gang? A. About three months, I believe, sir.

Q. Where was that gang employed? A. 57, Grace Line.

Q. The same pier! A. Yes, sir.

Q. Now, can you tell us about what the average time would be to load a cargo vessel of the Grace Line?

Mr. Taylor: Well, do you think this witness is qualified to answer that, sir!

Mr. Goldwater: I think he is from his experience, He has worked on these piers. He worked on the Grace Line piers with their ships. He said so.

The Court: Are all the ships relatively uniform?
The Witness: No. sir.

Mr. Goldwater: I asked him for the average time.

Mr. Taylor: The testimony is quite to the contrary.

The Court: You mean there are all kinds of ships?

Mr. Taylor: So Mr. Goldwater says.

The Court: Ask him first to identify the ships he is talking about; and perhaps you had better

1388

ask him about the ships that he personally has had experience with, so that we don't have to convert him into an expert, but simply to have his observational testimony.

Mr. Goldwater: He is far from an expert, except when questioned about his work. That he knows. But I think, your Honor, that he can tell what the average time is in the period that he has worked. The Court: If he will identify two or three or five ships.

Q. You have worked, Mr. Dixon, on loading ships at the Grace Line pier on and off, as you have described it, since April, 1944. Are these ships of a different size! A. Yes, sir.

Q. It takes different periods of time to unload and to load ships with different capacities? A. Yes, sir.

Q. Can you tell us in your experience what is the least number of days you worked on one ship, unloading?

The Court: He worked, or that it took to un-

Mr. Goldwater: He worked. He may not know. The Court: He may have only worked on it part of the time.

Mr. Taylor; That is right.

Mr. Goldwater: If I asked how long it took to unload, the objection would be obvious, your Honor. I assume that was the basis of the other objection, that he couldn't know, that he is not an expert.

The Court: He could know if he saw. Observational testimony does not require expertness.

Mr. Goldwater: I know what I can get from him definitely from his own experience.

The Court: All right.

Mr. Goldwater : I would like to take that first.

Q. Do you remember the question now, Mr. Dixon! A. Yes, sir.

Q. What is your answer!

The Court: Do you want to know how long he worked personally on any one ship!

Mr. Goldwater: Yes.

The Court: The least amount of time?

Mr. Goldwater: The least amount of time; that is right.

The Court: All right.

1394

A. Loading or discharging!

Q. Well, let us take unloading first, discharging. A. Discharging first. The least time I have worked on it is two nights, sir.

Q. What is the longest time that you have worked in unloading a ship? A. Two and a half nights.,

Q. Now, what is the least time you have worked in loading a ship.

Mr. Taylor: He gave that to you, didn't he!

Mr. Goldwater: No.

The Court: No.

The Court: The other was discharging.

A. At the Grace Line we have worked as high as three nights loading a ship.

> The Court: What is the shortest, you wanted to know.

Mr. Goldwater: No.

The Court: The shortest amount. 4.

Mr. Goldwater: The shortest was the first ques tion.

The Court: What is the shortest time you ever worked in loading a Grace Line vessel?

The Witness: Well, your Honor, the answer to that, it is hard to answer, to put it that way. If I started the ship and continued, that is one answer. I could say the shortest time would be two nights, according to what tonnage the ship is. Then again I could work on a ship two hours, just go there and finish up the mail. That is why I say it is hard to give an answer like that, sir.

The Court: That is right.

Q. What is the longest time that you worked on loading a ship at the Grace Line pier? A. I said three nights I have worked on loading a ship.

Q. Now, do you know the shortest length of time that it took to unload a Grace Line ship?

Mr. Taylor: I object.

The Court: Have you ever seen a ship from beginning to end, loading or discharging!

The Witness: Yes, I have seen it from beginning

to end, loading and discharging.

The Court: I will let him answer the question.

Mr. Taylor: May I find out whether the witness

understands that question to mean does he know the time between arrival and departure, or whether he knows the number of hours which the ship was actually being worked?

The Court: I take the question to mean the latter.

Mr. Taylor: How can he know if he was not there.

The Court: He says he saw it.

Mr. Taylor: Well, he was not there. We know he was not there.

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The Court: You mean that he went home and slept?

Mr. Goldwater: Mr. Taylor is testifying to so many things I begin to doubt whether I should begin to question him.

The Court: Wait a minute.

By the Court:

Q. Have you ever seen a ship continuously from the time it began to be worked until the time it finished. A. Your Honor, may—

1400

Q. No; you will have to speak up louder. A. Your Honor, I can answer that by demonstrating the ship that is in there now, that left this evening at three o'clock; maybe that will help. The Santa Barbara is a new ship of the Grace Line, came in one o'clock Sunday, it started at one o'clock Sunday, rather; it came in about 11:30. And the gangs wasn't ordered out—the first gang that went out was at one o'clock, that was some of the white gang. Our orders was put on the board at one o'clock for the same day to return, to report at 7 o'clock. That ship started to load one o'clock Friday. We went to work on it seven o'clock that night, Friday night, we worked all night.

1401

Q. Until when? A. Until Friday—Saturday morning, at 6; 8 o'clock the gangs started loading that same ship.

Mr. Taylor: Where did you go!

The Witness: I went home.

Mr. Taylor: O.K.

The Witness: I know it was 10 gangs put on that ship. That is the only one that was working. It worked Saturday up until 12 o'clock. Sunday they went to work at 8 o'clock.

Mr. Taylor: When did you come back?
The Witness: I went back Sunday night.

Mr. Goldwater: Are we cross-examining the wit-

The Court: He should not tell us hearsay.

The Witness: I am sorry, wir.

The Court: But I don't know what it is you are trying to develop.

Mr. Goldwater: I think it will become apparent,

your Honor, in a minute.

1403

The Court: All right. Go ahead and tell us what you want to say. Then you, Mr. Taylor, will cross-examine and move to strike out all this hearsay. I will instruct the witness, however, to give us only that which he saw.

Mr. Goldwater: I assumed your Honor would, and that is why I was asking him before to testify as to the time he worked the shortest number and the longest number of hours. I am trying to stick to the rules of hearsay, and that is the reason I put the questions that way.

The Court: All right.

Q. Do you know that when a ship started unloading that the gangs were continuously at work day and night until unloading was completed? A. I cannot answer that because I honestly cannot say what I did not see.

Q. Do you know from your conversations with other men who worked on the dock whether they worked unloading during the time when your gang was not working?

> Mr. Taylor: Objected to. The Court: Sustained.

Mr. Goldwater: I supposed the rules of hearsay applied to the plaintiffs' witnesses, but they did not seem to apply without objection.

1405

The Court: In the absence of objection they do not apply.

Mr. Goldwater: Oh, but there was plenty of objection.

The Court: Not on the grounds of hearsay. Mr. Goldwater: I think there was.

Q. How many regular night gangs did Huron employ, if you know, from April, 1944 until about October 1, 1945?

Mr. Taylor: I object.

The Court: You mean regular night gangs?

Mr. Goldwater: Night gangs.

The Court: Do you know? The Witness. Yes, sir.

The Court: I will let him answer.

Q. How many night gangs? A. They employed seven night gangs.

The Court: You said before from five to seven.

The Witness: From five to seven, yes.

The Court: Five normally, and seven when it was crowded, would you say; is that your answer?

The Witness: Yes, sir.

Mr. Goldwater: The question was how many night gangs are employed there now, and that was his answer. The question I now ask the witness is how many night gangs were employed from April, 1944 to October 1, 1945.

Q. And your answer is seven! A. Yes, up until the strike started on October 1st.

Q. Do you know the numbers of the gangs that did exclusively night work during that time. At I may not remember all the numbers.

Q. Give us some you do remember. A. 18 gang, 24, 25, 26, 27, 28, 29 and 30.

Q. On that pier do you know whether day gangs were switched to night work occasionally? A. I do not recall it before October 1st. Since then there have been day gangs switched to nights.

Q. Do you know how often day gangs are switched to night work? A. Two gangs go on one week nights, and go back to the days, and two more new day gangs come on, two different day gangs every week.

Q. Two different day gangs are switched to night work every week? A. Yes.

The Court: Was that the practice before October 1st?

The Witness: No, sir.

Q. What was the practice with respect to switching day gangs to night work prior to October 1, 1945? A. I did not get the question, sir.

Q. Was there any regular practice before October 1, 1945, with respect to switching day gangs to night work! A. All I know is that the colored gangs had all the night work. There was not any day gangs being switched over before then.

Q. Is there as much work on these piers at Huron now, or has there been since October 1, 1945, as previously!

A. No, sir; it has been quite slow lately, sir.

Q. When you were working on night work on general cargo, how much did you get per hour? A. Before October 1st?

Q. Yes. A. \$1.875.

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Q. What have you gotten since October 1st?

Mr. Taylor: Wait a minute; you mean after the date of the suit?

Mr. Goldwater: I place the date in question as October 1, 1945.

Mr. Taylor: I do not know the precise date. In the summons and complaint it has been set in October. I do not care whether it is the 1st or 5th. I am just trying to find out whether he is asking the witness as to a period after the beginning of this suit.

Mr. Goldwater: We will change the question.

The suit was commenced some time in October, Ido not recall the exact date.

Mr. Taylor: Your Honor will have in mind that the contract, the 1943-1945 contract, which was \$1.875 an hour, expired September 30, 1945, and the new contract was executed later.

The Court: If we have got some days after October 1st we will have to know the rate of compensation.

Mr. Taylor: We have agreed, I think, that all claims involved in this suit fall within the scope of the collective bargaining agreement of 1943-1945.

Mr. Goldwater: I will state now that no claim is made for any period subsequent to October 1st, so we will simplify this issue. It is unimportant whether there are a few days after. We abandon that completely and restrict our claims up to and including September 30, 1945. I will withdraw the question and I will rephrase it this way:

Q. What compensation did you get an hour for every hour of night work that you worked prior to October 1, 1945? A. \$1.875.

Q. If you worked on a premium cargo, on a special cargo, you got something in addition to that? A. Such as cement was a nickel more.

Mr. Taylor: Such as what?
The Court: On cement, when he got five cents, more.

Q. Did you work Sundays during this period from April 23, 1944 to October 1, 1945? A. Yes, we worked Sundays sometimes, not all the time. On Sundays, of course, all of us like to be off, but it is a very hard thing to do. That is where I am working now at Huron. For instance, if we should work five nights or six nights a week we would like to take Saturday and Sunday off but we have a rule there for the colored gangs, if they are off Sunday night we lose a whole week, so regardless of how tired we are we work Sunday night.

Q. You mean you are not put to work on a shape-up the following week if you do not work Sunday night when

there is work to be done! A. That is right.

The Court: When you say you work on Sunday, do you mean during the night hours or during the day hours?

The Witness: "No, I am referring to my job, the

night job.

The Court: Night hours! The Witness: Night hours.

Q. Have you ever worked Sunday during the daytime at all? A. At the Huron?

Q. Yes. A. No, sir; I never worked no days there.

Q. Did you know that on some of the Grace Line ships at various times the company did not use night gangs in unloading at all? A. You mean some ships would work without any night gangs being used? Not since I started we have not had a blank week what I consider a blank week. What I consider a blank week is no work at all. If

we work half a night the whole week, if we work half a night to finish up loading a ship, that is all we got for the whole week.

Q. If you went in to finish up loading a ship when did

you start to work! A. 7 o'clock.

Q. Then the ship had been worked on, loading, prior to that time! A. Yes.

Q. By another gang? A. By other gangs.

• Q. Can you tell me what the expression "working the ships slow" means in the stevedoring industry, "working the ship slow"! Do you recognize that expression! A. No, not exactly. "Working the ship slow"! No, it does not apply to where I have worked, anyway.

Q. What about the expression "stretching the cargo"!

A. We do not stretch cargo, not where I work. I know

what it means.

C. What does it mean? Let us take "stretching the cargo." A. Stretching time.

The Court: Taking it easy, making the job take longer?

The Witness: That is it, but we are rushed all the time. There is no such thing as stretching.

Q. Did it ever happen to you, Mr. Dixon, that you had the experience that you described a few moments ago, that is that you did not work Sunday night and were not given work the following week on the pier when there was night work going on? A. Did it happen to me?

Q. Yes. A. Yes, twice; once on an occasion here about, I believe it has been about two months ago. I believe it was about there. My wife took very sick on a Sunday. In fact, my hatch boss was right in my house when she took sick, and he knows I could not get in. I mean I could not get down to work that night, because there was

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1418

not anybody to take care of the kids. So I stayed home myself. I went down on a Tuesday night for the Tuesday night shape, because friends of mine that worked in the gang had came and told me they were working Tuesday night. I went down and was told I had to stay off for the rest of the week, and I did. I did not go back there to shape up, or any place else. I even spoke to what we call the union shop steward, and the answer he gave me was that "You could use a week, anyway, to rest." The only reason that he gave me was that I could use a week to rest, anyway.

> The Court: Are you a member of the I.L.A.I The Witness: Yes, sir.

Q. You are a regular member of the union

Mr. Taylor: We have stipulated that.

Mr. Goldwater: There is testimony here by Mr. Ryan that casts considerable doubt on the fact as to whether these plaintiffs were regular members of the union.

The Court: I did not hear that.

Mr. Goldwater: He said they were taken in and it did not cost them anything.

.The Court: I did not understand that testimony to apply to the plaintiffs. In any event, you say you are a member of the I.L.A.!

The Witness: As far as I know, yes. I-paid the same as anyone else did.

Mr. Taylor: We have stipulated in this case that all the plaintiffs were members in good standing in the I.L.A. Now why do we need to go into it.

The Court: We do not.

Q. Did you have the experience of not reporting on

Sunday and of being told you could not work the following week, on more than one occasion, or only once, the once you have described? A. I said on two occasions.

Q. Mr. Dixon, were there occasions when the board that you have described on the dock indicated that your gang was to report for work at night and you did report and that you did not go to work that night?

Mr. Taylor: Wait a moment, please. If your Honor pleases, I hope you will believe I have been trying to try this case wide open and have given you all the facts, but I do not think what is now going in evidence is rebuttal. I think it is part of the plaintiffs' case. I have sat here quietly, not knowing what Mr. Goldwater was getting at, and thinking that in some way or other he was going to connect it up with the theories or the positions, or whatnot, which we have taken, and now I think he is getting into matters which are not proper rebuttal, but which are part of his direct case, and I object.

The Court: All right, justify your question.

Mr. Goldwater: I say there has been testimony offered by the defendants which would tend to indicate that the night work was not regular, that it was an exception, that it was a continuance of day work, that it was so intended that night gangs did not work regularly, and I am attempting to prove by this witness that that is so.

The Court: Objection overruled.

Q. (Read.) A. From the time I have been there I remember once or twice, and the reason was the weather. We were reported to come to work, and at 7 o'clock it was raining very hard, and the stevedore waved us back.

Cross Examination by Mr. Taylor:

Q. Have you got your Huron card with you, Mr. Dixon!
A: Yes, sir.

Q. May I see it, please? A. (Hands card.)

Q. Did I understand you to say that the reason why you knew that you first went to work for the Grace Line on April 23, 1944, was because that is the date of the card? A. Yes.

Q. You never worked for them before that time!

. Q. When did you first begin working as a stevedore anywhere in the port of New York? A. As a longshoreman?

Q. Yes, I mean as a longshoreman. A. I started in deep water in 1943.

Q. During the warf A. Yes.

Q. You said something about somebody taking a gang to go down to the Grace Line to work, and asking you if you wanted to go along, didn't you? A. Yes,

Q. Is that the way you and some of the other men who live in the same part of the city that you do were hired; that is, you were hired up in Harlem and set down in gangs during the war? A. That has nothing to do with the part of the city I live in. This fellow that is carrying this particular gang now, that is carrying 24 gang, this particular fellow that is carrying the 24 gang now, for reasons that I do not know—that is his business—left 32. I was working in Brooklyn when he left there, and through information from some of the boys that I have worked with, they told me about this fellow had started carrying a gang up there, and the gang was split up. The stevedore at the pier broke the gang up, for reasons I do not know, but anyway I got in touch with this fellow on a Saturday evening and he told me to come on down,

he thinks he can place me and about eight other fellows, eight fellows, seven or eight fellows that we get together, we all worked together in 32. That is how this same 24 gang started. It is all men that worked together previous to the time we were there. Most of the 24 gang we work with new started on that same Sunday.

Q. Will you tell me whether or not when you did go to work for the Huron Stevedoring Corporation you were gotten together uptown and went down town and went towork, or whether you went down town and shaped at one or another of the Grace Line piers? A. I do not think you quite understand longshoring. You see, there is club gangs uptown. That is one thing where they shape uptown and go down town. I do not belong to a club gang. We shape up at the pier.

Q. Whenever you went to work for Huron you went down town and went into shape and were hired from the shape? A. That is right.

Q. So I understand you tried to work for Huron. You worked more for Huron than anyone else, didn't von! A. Yes.

Q. You knew that Huron did quite a substantial volume of night work? A. Before, I went there?

Q. Yes. A. No, I did not know.

Q. You came to know that, to be true! A. After I worked there; naturally, anybody that worked almost two years would know it is about the busiest pier in the city.

Q. And you knew that Huron perhaps worked more overtime; more night time work, than any other piers in the city, didn't you? A. I will have to explain that a little bit.

Q. All right, go ahead. A. One reason I took night work was because -

Q. No, I do not want to interrupt you, but what I am trying to get at is, so far as you know is whether or

not the Huron Stevedoring Corporation was one of the companies in this city, or in this port, who worked more night time work than others? A. I did not know that before I went there. Now I know it.

Q. And that is one of the reasons, I suppose, why you used to go back to Huron and try to work there, and why you got into these gangs that you told us about and used to work nights a lot at Huron, because they had quite a lot of night work to do! A. Yes.

Q. Well now, you would not want the Judge to under-1433 stand that you worked every week, would you? A. Eyery night of every week?

Q. Not every week; at least some one night in every week? A. Not only do I want him to understand it, it is a definite fact.

Mr. Taylor: Will your Honor please get out Exhibit 7, or may I hand you Exhibit 7.

Mr. Goldwater: The number at the top of the exhibit pertaining to this witness is 13,453.

The Court: That is correct.

Mr. Taylor: Your Honor will notice that the period covered by Mr. Dixon's employment begins on April 17, 1944, and ends on October 28, 1945.

Mr. Goldwater: .To be more accurate, it begins on April 23rd.

The Court: I think that is probably true. It is the week of April 23rd.

Mr. Taylor: That is right, there are 80 weeks. In other words, what I want to put in the record is that a comparison of Mr. Dixon's work record with the calendar will show that between the earliest week recorded and the latest week recorded there is a span of 80 weeks.

1485

Q. And, Mr. Dixon, I ask you if it is not true that out of those 80 weeks between the first week that you went to work and the weeks when you quit—

The Court: He has not quit yet. The Witness: I have not quit.

Q. All right, the last week covered-

The Court: Down to October 28, 1945 is the last week covered.

1436

Q. That there are 17 weeks in which you did not do any work for Huron at all? A. That is right. I told the gentleman there that I worked for Bay Ridge. When they were slow I worked for Bay Ridge.

The Court: So you mean you worked some time every week for some stevedoring company, not necessarily Huron!

The Witness: Not necessarily Huron, no. I have worked some nights out of every week.

Q. There are many weeks, are there not, in the course of your working for Huron, when you worked only one day in the course of the week! For example, you started on April 23rd, which was a Sunday night, and that Sunday was the only day that you worked for them in that week; that is correct, isn't it! A. One full night.

Q. And if we look at the week from October 30, 1944 to November 5, 1944, you worked only on Monday night of that week; is that correct? A. That is one night.

Mr. Taylor: I wish to say for the record, subject to correction by Mr. Goldwater if I am wrong about it, that this exhibit, which has gone in under

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stipulation, will show that during the period of this witness's employment there were four weeks during which he worked only one day.

Mr. Goldwater: One night.

Mr. Taylor: Well, I mean one 24 hours.

The Court: One working period.

Mr. Taylor: One working period of 24 hours; that there were five weeks in which he has worked only two calendar dates; that there are seven weeks under which he has worked recorded on only three calendar dates; that there are 20 weeks in which he has worked recorded on only four days; 12 weeks five days; 14 weeks six days, and one week seven days, and that the days worked per week averaged 4.22.

The Court: That is a pretty high average.

Mr. Taylor: Well, that is what it is.

Mr. Goldwater: Do you want to be accurate in your statement for the record, since you are summing up now, Mr. Taylor, and say that all of this work was done at night?

Mr. Taylor: If it is true.

Mr. Goldwater: Well, you know as well as I do that it was. Why don't you make the statement complete?

Mr. Taylor: Do not accuse me of that sort of thing. Some of these plaintiffs it is true with respect to and some it is not. Now just give me a chance to look and see. There would not be any point to try to evade it, even if I was of that kind of mind. The answer is that this man's record shows no work except that type of work which is recorded as overtime.

The Court: Is \$140 the highest weekly wage you ever collected there, Mr. Dixon?

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The Witness: Yes, I believe that \$140, your Honor, is that seven nights.

The Court: I do not know, I just see \$140.

Seven.

The Witness: That is the highest, sir.

The Court: You exceeded \$100 on a number of occasions, did you not?

The Witness: Yes, sir.

Q. That \$140 was for 741/2 hours work? A. Yes.

Mr. Taylor: Now then, your Honor will also notice, I am sure, that the number of hours worked is recorded day by day and week by week, and, subject to correction by Mr. Goldwater, for whatever significance it may have I would like to make the statement that this exhibit shows the following with respect to the number of hours that this witness worked per week: From zero to 9 hours one week.

Mr. Goldwater: I do not understand what you mean, Mr. Taylor.

Mr. Taylor: I mean the total hours was less than ten in one week.

The Court: For the weekly period.

Mr. Taylor: For the weekly period. The total he worked was from 10 hours to 19 hours in four weeks. It was from 20 to 29 hours in 11 weeks. It was from 30 to 40 hours in ten different weeks. The Court: 30 to 39.

Mr. Taylor: No, I included 40, and I included 41 to 49 in the next class.

The Court: In how many weeks was that? Mr. Taylor: In ten weeks. 1449

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Nathaniel Dixon-For Plaintiffs-Rebuttal-Cross.

Mr. Goldwater: Have you any particular reason for changing your grouping?

Mr. Taylor: Yes, because the next class is 41 to 49. There were 19 weeks in which his total hours were between 41 and 49, inclusive; 50 to 59 eight weeks; 60 to 69, nine weeks, and 70 to 79 one week. The average, if I have computed it correctly, is 41.32 hours per week. I do not know that the average is particularly important. It will appear in the case of this particular plaintiff that out of the 63 weeks which he worked out of the total span of 80 weeks he worked more than 40 hours in 37 weeks and less than 40 hours in 26 weeks.

By Mr. Taylor:

Q. Now, Mr. Dixon, I want to just go through your record, to see what it shows with respect to your statements that unless you went down there and worked on Sunday nights they would not let you work the next week. Now, going through this—

Mr. Goldwater: That is not what the witness said.

The Court: He said if there was work on Sunday nights.

Mr. Goldwater: Yes, if he did not work when he was directed to work.

Mr. Taylor: All right. All I can point out is what the record shows. Beginning on page 1, the week from May 8, 1944 to May 14, 1944, you see there is no work recorded on Sunday and he did work during the next week.

The Court: That is right.

Mr. Taylor: Whether there was or was not work on Sunday night I do not know.

Mr. Goldwater: That is which week!

.

Mr. Taylor: Page 1, May 8th to May 14, 1944.

The Witness: Your Honor, if you even go through every sheet here you could not find that, because that has been a rule since October 1st, since we had that strike. If we go in there now, I said if we do not go in Sundays now we do not work the next week.

The Court: That did not prevail before October 1st!

The Witness: No, sir-

The Court: I am glad you corrected that, because I had the contrary impression.

Mr. Taylor: I think that is all. The Court: Any re-direct?

Re-direct Examination by Mr. Goldwater:

Q. Can you tell us whether there was any general practice which would affect work in a following week if you did not work on a Sunday night, when there was work, prior to October 1st? Do you understand my question? A. No, sir.

Q. Perhaps I did not make it quite clear. Will you think now of the period before October 1, 1945. If, during that period between 1943 and October, 1945, there was work on a Sunday night and you were told, your gang was told to work and you did not come to work, was there any rule as to what would happen to you in your work for the following week! A. No, sir.

Q. There was not! A. No. sir.

Mr. Goldwater: That is all.

(Witness excused.)

1451

· Alanzo E. Steele-For Plaintiffs-Rebuttal-Direct.

ALONZO E. STEELE, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

Q. Mr. Steele, are you working as a longshoreman! A. That is right.

Q. Where do you work now! A. At present I am not working for any one particular concern. I am just working wherever I can get it.

Q. Did you go to work for Huron in April 1944? A. That is correct.

Q. Did you go at the same time that Mr. Dixon went?

A. I cannot remember distinctly, but I think the identi-

fication card reads April 30, 1944.

Q. Have you got your identification card with you? A.

I think I have, yes, but the number is hardly legible.

Q. Does it show it was April, at any rate? A. Yes, I think you can see it.

Q. Who sent you to work at the Huron-

1452 Mr. Taylor: I object.

The Court: The objection is overruled.

Q. Who went you to work there! A. I went there to look about a shape and I got a gang there.

The Court: You went there on your own account?

The Witness: Yes, I went there on my own account.

The Court: You had been doing longshoring before!

. The Witness: Yes, definitely.

1454

Q. Where had you been working before? A. For various companies, for Bay Ridge Operating, Union Stevedore, De Simone Stevedore and various other companies.

Now, I cannot recall the names.

- Q. You remember those three distinctly! A. Yes.
- Q. When you went to Huron whom did you see there?

 A. Myself and another fellow by the name of Brantley.

 We went inside and saw I believe his name is Mr. Fortune and Mr. Maher.
 - Q. Do you know what they were on the dock? A. Mr. Fortune was supposed to be the dock superintendent and Mr. Maher, he was the head stevedore.
 - Q. Did you have a talk with them about working for Huron! A. Yes, I did:
 - Q. Tell us what that conversation was. A. Well, Mr.

Mr. Taylor: I object.

The Court: I will allow it. A conversation with the defendant,

Mr. Taylor: Yes. But not properly rebuttable.
The Court: Well, I assume that it goes to the same subject matter that you raised before.

Mr. Goldwater: Of course it does. I am trying to identify the people that he talked to as the representatives of the company there as preliminary.

The Court: I will allow it. Go ahead.

A. Well, Mr. Fortune and Mr. Maher were there and they told us, in fact they asked us to get five gangs for them; this is myself and this other fellow by the name of Brantley. And we told them—the reason they told us that they needed five gangs was because they were shifting a lot of ships from New Orleans, on the Grace Line ships, they were shifting a lot of ships that was coming in here on the North River that came into New Orleans and

were going to come in here in the North River, and they would need some gangs.

The Court: How many men is a gang?

The Witness: A gang constitutes 21 men with the foreman. They asked us to get five more gangs. They asked us to get more than five if we could. We hesitated and we wouldn't take but two gangs. We told them that we would bring two gangs. We asked them could we work days. And Mr. Maher told us, he said he couldn't tell us definitely whether we would work days or nights. But he said he would give me a call. And when I did get the call the call came for night work.

Q. How did you get that call, by telephone or what?

A. Yes, I got the telephone call that tells me to bring the gang down to the pier.

Q. Had you in the meantime rounded up the 20 men for the gang? A. Yes, I had. I got the call sometime—sometimes I wouldn't get the call until about three o'clock and I would have to go out and round up the men then.

Q. That is, round up the men to come to work at what time! A. Well, I would shape the men up again at five o'clock, I would shape the men for the 7 o'clock shape in order to procure the men. I would have to get them at 5 o'clock.

Q. When you say you shaped them up at 5, will you tell us just what you mean by that! A. Well, you see labor was a little difficult, it was hard to get labor in those days anyway. And for me, if I went out to shape, say I supposed to start at 7 o'clock, if I went out at 7 o'clock I couldn't get no men at 7 o'clock; I would have to round them up at before 5 o'clock to get them for 7 o'clock.

Q. You would bring them down to the shape at 7! A. That is right. I would bring them down to the pier.

Q. The record of your work which is in evidence here, the time sheet, would show that your first day of employment by Huron was on Sunday, April 30th. A. That is correct.

Q. Did you report regularly for shape at the Hurch docks after that time? A. Yes, I went there to look for work. Lots of times I couldn't get it. If I couldn't get it at night I would go there in the morning. But I

never could get a shape in the daytime.

Q. How many times to the best of your recollection while you were working at Huron between April 1944 and September 30, 1945, did you go to the Huron docks in the daytime looking for work? A. After April 30, 1944, I carried a gang, I was hatch boss there for about I think two months, and I got some work there; I would get two nights, three nights a week, and after we couldn't get that work I tried to shape in the daytime. I did that for about two or three months. Then I stopped going to Huron altogether. And then didn't go back there until I believe February 1945.

Q. In the meantime did you go to other does to shape?

A. Yes, sir, I did.

Q. What other docks did you go to to shape? A. Bay Ridge Operating, Union Stevedore, Jarka, Moore-McCormick.

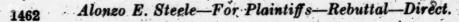
Q. Did you ever get day work at any of these docks? A. Yes, I did.

Q. For any extended, continuous period of time? A. No. Sometimes once in a while I would get a week, maybe four or five days; but generally they averaged about three and a half to four days.

Q. Did you get work at night at any of these other docks? A. Yes, I did. I took it when I could get it. It

was catch-as-catch-can.

1460



The Court: As far as Huron was concerned you never worked by day?

The Witness: I never worked for Huron by days.

Q. Now, were you familiar with the practice of posting a notice on the bulletin board at the Huron docks?

A. Yes, I was.

Q. Will you tell us about it, what that notice indicated?

A. This bulletin board is a board down by the dock on Pier 57, situated, with the orders for every gang. The gangs was all numbered on that line I believe from 18 to 30. And if your gang—

Q. By the way, what was your gang number? A. No. 27. If your gang is going to work that night the number is posted on the board and you have to go downtown and find if your gang is going to work.

Q. Did you ever work in gang 24! A. No, sir.

Q. Did you work Sundays? A. Yes, I worked Sundays for Huron.

Q. Since you worked only nights that would be Sunday nights you worked for Huron! A. Yes, I worked Sunday nights for them.

Q. Mr. Steele, was there any practice at Huron prior to October 1st with respect to whether or not a man would get work the following week if he did not report for Sunday night work when he was told to? A. Yes. That happened frequently. It was according to how the stevedore feet

The Court: What would happen?
The Witness: Well, sometimes if a man didn't show up on Sunday night he wouldn't shape him on Monday night. He may change his mind. The man comes down on Tuesday night and he may shape him.

Alonzo E. Steele-For Plaintiffs-Rebuttal-Cross.

1465

The Court: What you mean is sometimes a man was penalized by the stevedore on the question of hiring?

The Witness: That is right. Sometimes he would penalize him for the week.

The Court: There was no general practice!

The Witness: No, not until after October 1st.

There was general practice

The Court: Not until then?

The Witness: But the practice occurred before October 1st. That is how I explained it to you.

Mr. Goldwater: That is all.

Cross Examination by Mr. Taylor:

Q. Mr. Steele, when you said that you used to shap the men, will you tell me, please, where you used to shape them? A. 134th Street and Lenox Avenue. You see, when I first went—

Q. Wait a minute. Where? A. 134th Street and Lenox Avenue.

Q. That is not a pier! A. No, sir, it is not a pier.

Q. Why did you hold the shape up at 134th Street and Lenox Avenue! A. Because I had to get the labor there.

Q. You had to get the labor! A. Yes, that is right,

Q. Did you know how many men you were supposed to get? A. Yes. They told me.

Q. How did you know? A. I would get the order by telephone. Sometimes I would have to go down to the pier and look on the board.

Q. So, either by telephone from the Huron Company or by going down and looking at the board and knowing that your gang number was whatever it was— 27 I think you said— A. At that time it was 33.

Q. All right, 33. —and knowing that they wanted gang

1 :

Alonzo E. Steele-For Plaintiffs-Rebuttal-Cross.

33 to work there, that meant 21 men they wanted you to get! A. That is right.

Street and hold the shape up there and try to get yourself that many men? A. That is right.

Q. Did you have any trouble getting them? A. Well, they would vary. Sometimes I would have trouble getting

them, sometimes I wouldn't.

Q. Sometimes you would get one group of 21, sometimes you would get another group? A. That is right.

1469

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The Court: You mean they were not always the same 20 men?

The Witness: No.

Q. Did you always hold your shape at Lenox Avenue and 134th Street; didn't you sometimes shape them downtown? A. Yes, I shaped downtown sometimes.

Q. In other words - A. Let me explain it to you.

Q. Wait a minute.

Mr. Goldwater: I think the witness ought to be permitted to answer the question, your Honor.

The Court: If counsel wants to insist on his questions, he is entitled to do so.

Q. Under what circuinstances, Mr. Steele, did you shape them downtown instead of shaping them uptown? A. Why did I shape them uptown instead of downtown?

Q. The other way around. Why did you shape them downtown instead of uptown? A. I told you before, sometimes I couldn't get all the labor downtown. That is why the stevedore came to me and asked me to get the men because he couldn't get the labor downtown at the pier.

Q. So you tried to shape them downtown—see if I get

this—knowing that they wanted a gang at 7 o'clock— A. That is right.

Q. -and you would start trying to get them together

at 5? A. That is right.

Q. And you would try to get them together at 5 downtown and if you couldn't get them downtown you would go uptown; is that the way it worked? A. No. I got them from uptown. I would be down at the pier at 7 o'clock. I would start at 5 getting them together.

Q. Didn't you start getting them together at 5 some-

times downtown? A. No.

Q. Your shape, your 5 o'clock shape was always uptown? A. That is right.

Q. Well now, it is clear from your record, Mr. Steele, which is in evidence—

Mr. Taylor: I assume your Honor has looked it over.

Q. —that you didn't work every day or even every week!

The Court: For Huron.

Q. (Comining) Between the time you started to work 1473 for Huron and the time you last worked for Huron within the period of this suit. A. I did not.

Mr. Taylor: For the sake of the record, and subject to correction, I should like it to appear that the period covered between the earliest date when Mr. Steele went to work for Huron and the latest date which is in evidence in this case is 79 weeks; that there were 46 of those 79 weeks in which Mr. Steele did some work, and there are 33 weeks—

Mr. Goldwater; For Huron.

The Court: For Huron; that is right.

Alonzo E. Steele-For Plainliffs-Rebuttal-Re-direct.

Mr. Taylor: For Huron; yes, sir.

(Continuing) —and there are 33 weeks in which he did not work at all for Huron. That there are 5 weeks, now coming to the distribution in the 46 weeks that he did work for Huron, there are 5 weeks when he worked one day, 5 weeks when he worked 2 days, 3 weeks when he worked 3 days, 15 weeks when he worked 4 days, 12 weeks when he worked 5 days, 6 weeks when he worked 6 days, and no weeks in which he worked 7 days. The average is 3.93 days per week.

As to the hours worked during the weeks, 0 to 9 hours one week, 10 to 19 hours 5 weeks, 20 to 29 hours 7 weeks, 30 to 40 hours 13 weeks, 41 to 49 hours 9 weeks; 50 to 59 10 weeks, 60 to 69 one week, 70 to 79 no weeks. Average 37.99 hours.

That of the 46 weeks that he worked some time there are 26 in which he worked more than 40 hours, 26 in which he worked less than 40 hours.

That is all.

1475

Re-direct Examination by Mr. Goldwater:

1476 Q. What did you mean when you said that you shaped up uptown? Tell us what you did. A. I proceeded to get men, to get the men for the regular shape up at 7 o'clock.

Q. Did you go around the neighborhood and get the men that were available for work so that you could bring them down for the 7 o'clock shape-up, is that what you mean? A. That is right.

Q. Were these men all members of the Longshoremen's Union? A. That & right:

Q. Where else did you work during this period when you were not working for Huron! A. I worked for Bay Ridge, I worked for Union Stevedore, I worked for Jarka.

James Thomas-For Plaintiffs-Rebuttal-Direct.

1477

By the Court:

Q. Is this 134th Street and Lenox Avenue outdoors? A. That is right, it is outdoors.

Q. Just on the street corner? A. Yes, sir.

Q. The boys knew that that is where you would meet?
A. Yes sir.

Q. You would go around and tell them, and hustle around? A. That is right.

The Court: All right. You are excused.

(Witness excused.)

1478

James Thomas, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

Q. Mr. Thomas, what is your work! A. Stevedore foreman, longshore.

Q. How long have you been working as a longshoreman! A. Since 1908.

Q. Where are you working now, Mr. Thomas?. A. The Bay Ridge Operating Company.

Q. Are you a member of the I. L. A.? A. Yes, sir.

Q. How long have you been a member? A. How long I been a member of the I. L. A.? 1916.

Q. How long have you been working for Bay Ridge?

Q. Now, you are a hatch boss? A. Well, I was hatch boss, but I am assistant foreman under Brown.

1481

1482

James Thomas-For Plaintiffs-Rebuttal-Direct.

Mr. Taylor: Mr. Thomas, would you keep your voice up so that we can hear what you have to say, please?

'The Witness: I am trying to do that now, if

I can.

Q. Are you in charge of a gang at Bay Ridge now? A. Yes, sir. Whenever they have work I am in charge of it.

Q. Were you in charge of a gang at Bay Ridge ever since you have been working there! A. Ever since I was there, in charge of a gang.

Q. What is your gang number? A. They don't run by

numbers.

Q. Is there any other way that the gang is designated?

A. If I got five gangs we put them one in each hatch. But they don't run by number like the Huron people.

Q. How do you know at the Bay Ridge when your gang is to work? A. Well, Mr. Walker call up Brown, head foreman, then Brown call me.

Mr. Taylor: Wait a minute, please. Is this rebuttal?

The Court: Yes, sir. I take it we are still on the same subject.

Mr. Goldwater: We are, your Honor.

The Court: Rebutting the degree of irregularity which has been suggested.

Mr. Goldwater: That is right.

* The Court: All right. That is what I am listening for.

Q. Then you would get your word by telephone; is that it? A. Yes, sir, by telephone; right.

Q. Has it been that way regularly since you worked for Bay Ridge? A. For the last five years, by telephone.

James Thomas-For Plaintiffs-Rebuttal-Direct.

1483

Q. How is your gang told to go to work?

Mr. Taylor: What do you mean "your gang"? He said he did not have gangs.

Mr. Goldwater: Oh, yes.

Mr. Taylor: They did not have numbers.

Mr. Goldwater: Oh, yes. He said he had gangs but they didn't have numbers.

Mr. Taylor: What do you mean by "your gang"?
Mr. Goldwater: The gang which he is in charge
of.

Mr. Taylor: He is in charge of five gangs.

1484

Q. Are you in charge of five gangs? A. Sometimes 15.

Q. Sometimes 15? A. Yes.

Mr. Goldwater: All right.

The Court: You had better modify your question. Mr. Goldwater: I will.

Q. How did the gangs of which you are in charge know when they are to go to work? A. Well, they are called, if they don't eall Brown.

By the Court:

1485

Q. You mean the individual man calls you? A. Yes, the individual man calls me at my house.

Q. On the telephone? A. On the telephone; call the rest of the foremen who got the gangs there. Then the gang, the 21 men that worked in the gang, they will call the foreman. That is how they get the work. They godown to the pier to shape.

By Mr. Goldwater:

Q. You mean they do this telephoning before they go to the pier to shape up? A. Yes.

*1486

James Thomas-ForPlaintiffs-Rebuttal-Direct.

The Court: You must have a pretty busy telephone.

The Witness: No. Everybody got your own phone, practically all the foremen got the telephone. I got mine in the house.

The Court: Yes. But they all call you up to

find out whether they are-

The Witness: No, not everyone call me. Certain men will call me. The rest of the gang call—

The Court: That is just to save them the tripof going downtown to look at the board.

The Witness: There is no board.

The Court: If you say there is work to do they will go down and shape?

The Witness: Yes.

The Court: If you say there is no work it will save them the trouble of going down?

The Witness: That is it.

Q. Is it a practice, after they have gone down to shape, to let the men know whether they are to return, when they are to return for continuing work? Do you know what I mean? A. How is that?

488 Q. Suppose men have gone down to work and do work day or night, are they told when they quit when to return? A. Yes. When you knock off in the morning, six o'clock, they tell you to call for orders the same thing, call back to my house or call to the foreman's house. Mr. Walker call Brown from his office, then Brown call me.

Q. Then do they always learn from day to day whether they are to go to the shape-up or telephone you? A. Yes, sometimes they do, sometimes they get telephone orders, "Back here tonight at 7 o'clock."

Q. Ti at is what I was asking you. They are told sometimes to come back tonight at 7 o'clock? A. Yes.

Q. You say they are told that when they knock off i A. Yes, sir.

Q. Are the gangs of which you are in charge gangs which work day or night or both? A. Well, whenever they got the night work we work nights; if they haven't got it they put two gangs working day and the rest of them in the street. That is whenever they got the work.

Q. And the rest of them where? A. In the street, do-

ing nothing; no work for them.

The Court: You work both day and night, sometimes by day, sometimes by night?

The Witness: Sometimes by day, sometimes night. Most of them is days. I work in two classes of ships.

Q. What do you mean by two classes of ships? A. Why, I work two classes of ships. One is a "reefer," frozen ships. That is all that stuff meat and stuff like that.

Q. It takes frozen goods? A. Frozen.

Q. Frozen goods? A. Yes. Then the next is a lumber ship, in New Haven, Connecticut. There is two classes of ships there.

Q. When the men start to work are they employed for any continuous definite number of hours? A. No.

Q. Then they never know when they start for how many hours they are going to work? A. That is right.

Q. Mr. Thomas, before the war, in 1938 and 1940, 1941, how many shape-ups were there in the port here in New York? A. Supposed to be three but they make six out of it.

Mr. Taylor: You are asking this man before the war how many shape-ups there were in the port of New York?

1490

James Thomas-For Plaintiffs-Rebuttal-Direct.

Mr. Goldwater: Yes.

Mr. Taylor: Do you mean what the contract calls for?

Mr. Goldwater: No. How many there were, actually. He is going to tell us now what the actual facts were.

Mr. Taylor: How can anybody possibly answer that question?

Mr. Goldwater: He can tell you what his actual experience was.

Mr. Taylor: On any particular day how many piers—

The Court: No. I think he is sufficiently well informed on the basis of his long experience to be able to tell us generally what is the condition in the port, if there is a general condition. I will allow it.

Q. Will you answer the question? A. How is that?

Q. Before the war how many shape-ups were there generally in the Port of New York? A. Shape at 8.0'clock in the morning, that is when the ships come in. Take the deck gang and get the ship rigged up. Take the deck

1494 crew-

The Court: That is not the question.

By the Court:

- Q. The question is how many shapes were there. You say there is one at 8 o'clock? A. Yes.
 - Q. When was the next one? A. 9 o'clock.
 - Q. 9 o'clock there was another one! A. Yes.
 - Q. When was the next one after that? A. One o'clock.
- Q. When was the next one after that? A. Three o'clock in the afternoon.
 - Q. Three o'clock? A. Yes.

James Thomas-For Plaintiffs-Rebuttal-Direct.

1495

Q. The next one after that? A. 7 o'clock at night.

Q. Then the next one after that? A. That is all; to 12 midnight.

By Mr. Goldwater:

Q. Have you worked Sundays! A. Yes, sir.

Q. Both before and during the period of the war! Yes.

Q. How would you know when you were to work Sunday? In the same manner as you have told us before, by. telephone message! A. I would get orders at 11 o'clock 1496 Saturday for Sunday work.

> The Court: Is that 11 p. m. or 11 a. m. ? The Witness: 11 a. m.

Q. Did you ever go to shape up on Sunday during peacetime? A. Yes, sir, I did.

Q. Did it happen just occasionally or quite regularly? A. Well, when the work was there we would go to work, regularly. If there was anything doing we would come back home if there wasn't no steady work to go to; look for a job Sunday morning as well as Monday morning. There wasn't any steady work.

Q. Then, in your experience the effort of your gang or the people you knew in the industry was to get work on Sundays the same as every other day in the week!

A. The same as every other day in the week.

The Court: You mean, to look for workt The Witness: Look for work on Sunday; don't get a telephone call you got to go and look for work on Sunday.

Q. Now, were there any extended periods of time, Mr. Thomas, since you have been in the industry when you worked regularly days for long stretches without any

night work? A. Well, no, it wasn't no such thing. Some we worked two or three days one week, next week we don't get anything, you got to look for night work again. Maybe you catch one or two nights, you get out of that and then you got to look for day, work again.

Q. Do you know of any longshore firm, stevedoring firm employing longshoremen who work only from 8 a. m. to

5 p. m. and Saturday mornings only? A. No.

Q. Now, have you ever had the experience of being a part of a gang that was called out for work on a particular night and after shaping up or getting to the ship and before being put to work, being told that there was no work that night! A. No, I have started to work, work about a half hour, maybe an hour, and in the case of rain knock off there, there is no more work to be done any more after the rain starts.

Q. You say in case of rain- A. Yes.

Q. Would that be the only reason that you can recall that the gang was knocked off? A. No. Got another reason there. If they ordered the gang down and the ship not there you got to go back just the same, if the ship is not in port. Sometimes they order the gang out again, the ship not there, they expect the ship to be in before the 7 o'clock shape and the ship didn't come in and the gang got to go back again.

Q. When you say the gang has to go back, go back where? A. Go back home; in the house.

Q. And report again? A. Report the next morning, or one o'clock, whenever the ship come in. If we work nights they tell you to go back home and come back tomorrow morning 8 o'clock, you come back again and look for the ship. If that ship isn't in you come back at one o'clock.

Mr. Goldwater: That is all.

Cross Examination by Mr. Taylor:

Q. Mr. Thomas, you worked for other people besides Bay Ridge, haven't you! A. Yes, sir, I did.

Q. How many other people? A. Pretty well all of them on the riverfront. Carter & Weeks, M. P. Smith.

The Court: You worked for a great many steve-dores!

The Wifness: Yes, a great many stevedores. Grace Line:

1502

Q. I wish you would tell us what you meant when you said that you had shapes at 8 o'clock, 9 o'clock, 10 o'clock, 3 o'clock and 7 o'clock. The reason I ask you, Mr. Thomas, is because the I. L. A. contract which we have in the court here says that shaping time should be at 7.55 a. m., 12.55 p. m. and 6.55 p. m.? A. That is right.

Q. But you say they had more shapes than that! A. That is right. If the ship come in 8 o'clock in the morning, if she didn't be at the pier 8 o'clock in the morning they will send the gang back until 9 o'clock. They would shape at 9 o'clock, 9 o'clock they shape them and not work then until 12 and if the ship not there at 12 o'clock, have a 1 o'clock shape, then they will bring them in at 3.

Q. Well, you wouldn't want us to understand, would you, Mr. Thomas, that at every pier in the port of New York on every day, year in and year out, there are shapes at 8 o'clock, 10, 3 and 7? A. No, that don't count for every pier.

Q. Is this what it amounts to, that a particular company or a particular pier that expects to have a ship come in, or where a ship has come in, the first shape that happens during the day is set down under the contract at 7.55; that is what you meant by the 8 o'clock shape, isn't it?

A. That is right.

1506

James Thomas-For Plaintiffs-Rebuttal-Cross.

- Q. So that at 8 o'clock whatever men there are going to be—or may do work at that pier on that morning, they gather around? A. Yes.
- Q. Then if the ship is late or there is a fog or it is raining or something so that they don't want to hire any men at that time, that is what you mean that they then say, "Come back at 9 o'clock"! A. The stevedores will send the men back to the ship at 9 o'clock. The ship is there.
- Q. If they can't get them to work at 9 they say, "Come around at 10, maybe we can get going at 10"? A. "Come back at one o'clock."
 - Q. Didn't you say 10-

The Court: No.

A. One o'clock. I told you 8, 9 and 1. Q. 3 and 7, is that right?

The Court: And midnight. There were five or six you mentioned.

Mr. Goldwater: That is five.

The Court: Is that five? All right.

Mr. Goldwater: 8, 9, 1, 3 and 7.

Q. But in each instance what happened was that when the men came back hoping that the steamer would be in and they would want them to work, why, there would be a shape; they were not actually ordered back but they were ordered to come back to look? A. Ordered to come back looking for a ship, yes. They were ordered back for a shape.

Q. That happened all over the port? A. Practically all over the port, as far as I have been.

Q. You are not talking about a situation where the men having gotten together at a particular shape are told

definitely to go to work at a certain time, are you? A. I was told to come back at that pier at such and such an hour.

Q. What I am trying to get at is whether you are talking about a situation where the men having shaped at a particular hour, we will say 7.55 in the morning, they are then told to come back at 9 o'clock to go to work or told to come back at 9 o'clock to shape again? A. Yes.

Q. Which do you mean? A. If the ship is not there

for 8.55-

Mr. Goldwater: 7.55.

1508

A. (Continuing) -7.55, they order the gang back for 9 o'clock.

The Court: To work or to shape?

The Witness: To go to work at 9 o'clock, the ship will be ready, to go to work at 9 o'clock. If the ship isn't there at 9 o'clock you will come in at one.

Q. In other words, you have a shape at 8 o'clock at which you either take them on or you say, "Come back to work all?"! A. That is it.

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- Q. And if they don't go to work, if they are not ordered to work at 8 o'clock or ordered in at 9, then the next thing that happens is they shape at one o'clock? A. Yes. If it is not at one—
- Q. At one o'clock they either set them to work or else they say, "Come back and go to work at 3"? A. Yes, sir.
- Q. If they don't do it at one o'clock then the next shape happens at 6.55 in the evening? A. 6.55.

Mr. Taylor: I don't think I have any further questions.

James Thomas-For Plaintiffs-Rebuttal-Re-direct.

Re-direct Examination by Mr. Goldwater:

Q. Mr. Thomas, do you know whether the stevedoring companies in the port of New York during peacetime worked regularly nights throughout the city! A. Yes, I know of quite a few of them. I know M. P. Smith were one and Ward Line was the second. That is the Cuban Mail Ship Company.

1511

The Court: You know some companies worked pretty regularly nights?
The Witness: Yes.

Q. In answer to Mr. Taylor's question a minute ago about the men coming to shape at 7.55, you said that they might be told to come back to work at 9. Now you don't mean by that, do you, that when they were told to come back to work at 9 that they were paid for time from 9 o'clock on! A. When they come back to work and start at 9 o'clock they get paid from 9 to 12.

Q. If they start at 97. A. If they start at 9.

Q. But when you said they were told to come back to work at 9 and if the ship were not ready when they came back at 9 they were to come back at one, in that case they would get no pay for the morning, would they!

A. No pay, no pay. That is it.

Mr. Taylor: I don't know about that. The contract—

Mr. Goldwater: You may not. The witness says he does.

Re-cross Examination by Mr. Taylor:

Q. I have here this little book. You have seen it before, haven't you? A. I think I have.

Q. It says in here, "When men are employed at 8 a. m. to 1 p. m. or are ordered out for another hour during the morning or the afternoon on any weekday from Monday to Friday inclusive they shall receive a minimum of two hours pay for each period they are employed or report for work when so ordered out, regardless of whether conditions, unless the ship or the hatch in question, or employees complete discharging or loading in less time." Is that the way it was done? A. The way you got it in the book, if the men start to work they make two hours if they knock them off. They don't give you no such two hours when they order you out in the morning, they don't give you the two. That is in the agreement; you don't get it.

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Q. If you go down there at 7.55 to shape and they don't hire you and they don't order you to come back to go to work at 9 o'clock or any other time, you don't get any pay! A. No.

Q. But supposing at the 7.55 morning shape they say, "Come back and go to work at 9," then what happens in the matter of pay?

The Court: In case there is no work to do at 9.

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A. In case there is no work you don't get paid. But if they start in at 9—

Q. If you do start in, why, you get two hours pay whether you work two hours or not, except in case where you finish the ship in less than two hours? A. You get paid from 9 to 12 if they lets them know. If they don't let us know, you have the ship give up, you give up—

Mr. Taylor: I don't know that it is very important.

The Court: All right.

(Witness excused.)

Louis Carrington, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

Q. Mr. Carrington, were you engaged in longshore work in New York Harbor beginning about 1942? A. Well, I wouldn't give any exact date, because I have a record, I looked for it, and, I mean, I don't want you to back me with the date because I can't give it. I don't remember any definite date. But I have been working right after the war started. In other words, the job I was working on closed down for the war and I went longshore.

Q. How long are you working at longshore work? A. Until October, until the strike, which was October 3rd I

think or 1st.

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Q. 1945! A. Right.

Q. You are no longer engaged in that work! A. No.

Q. During that period did you work for Bay Ridge! A. In and out. I worked for Bay Ridge more than anybody else in the later years:

Q. What other companies did you work for in the port of New York? A. I would say seven. I mean, I got seven.

1518 Anyway, four or five.

Q. Suppose you give me the names of those that you can remember. A. Carter-Weeks, Moore-McCormick, I worked for them quite a while. I worked a bit for Jarka and DeSimone, that is No. 2 Broadway. And I worked for Union Stevedoring and United States Lines. That is the last one I worked for. And I guess that should be enough. I could keep on going. I don't know how many more. I have the cards in my pocket, a lot of them.

Q. Who was the foreman under whom you worked at Bay Ridge? A. I practically worked for different ones. I

worked for a fellow by the name of Fields.

Q. Did you know Crown! A. Brown was the big boss over most of the colored gangs or all the colored gangs.

Q. How were you told when there was work for you to do! A. Well, it was—do you want me to go into details!

Q. Yes. You tell us how you would know how you were to go to work. A. For instance, if we were going to work today, well, some of the boys would call—mostly I did, I never called anybody else's house because there was men that married, who had a family, he didn't want the Mrs.—you know, they might think you were calling up for something else; so I was calling the union. The boss calls Mr. Brown, that is Mr. Brown calls, or the foremen, and relay it to the union for the others. Mr. Brown would tell his foremen. Then he would call up Mr. Pollack, secretary of the union. Then the people like me who didn't want to call up the boss's house would call the union. But I had to call 4 or 5 o'clock I think it is, I am not sure of that, but I think, if I would get the call; before 5. That is how I find out if I am going to work.

Q. Did you work days or nights or both? A. It was

practically even with me, practically even.

Q. Notwithstanding these telephone calls, did you go to shape up before you worked? A. If I made the call and they say you are going, then you can get work there. But that is just—with me calling up every day, most of the time you have that call, you work. But in many cases you don't. Then if you call and they say "No," you have a chance to go some place else and shape.

Q. If you call and they say there is no work, then you could go somewhere else and shape? A. That is right.

Q. Did you go to other places to shape when you found out there was no work in Bay Ridge? A. Well, proof enough, I had about 15 cards. In other words, when I turned in for income tax I turned in 27 of them and the man that filled it out for me got disgusted I think. I know it was over 19.

The Court: Different companies?

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Louis Carrington-For Plaintiffs-Rebuttal-Direct.

The Witness: Right. And that goes into the income tax, and the man that made it out he got disgusted.

The Court: In other words, your income tax for one year, you reported income from 19 different

stevedoring companies?

The Witness: Different companies. When I visited there. Because I had a lot of trouble with the man that fixed it up; he wanted to put me in jail almost for giving them to him. And it was the day before the last day.

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Q. Those nineteen employers were all stevedoring companies? A. Yes, sir. I never worked nowhere else since . the war. I only had two jobs in New York, that is sandhog and longshore. I never did anything else.

Q. Your first job was the longshore work! A. No. The first was sandhog, and then the war closed sandhog, closed the hole, and I had to go longshore. I had no choice.

Q. Since you have left the longshore work have you gone

back to the sandhogging? A. That is right.

Q. Well now you say that your work was practically about even day and night work? A. That is right. imagine so. I wouldn't say exact.

Q. Well, you are giving your best recollection? A. As near as I could figure, yes.

Q. You know that you worked a considerable amount day

and a considerable amount night? A. That is right.

Q. And did you work when you were working nights one night after another, straight running, and no daytime in between? A. Well, that just depends. Most of the time they put it in this way. You would go to work here tonight, like especially if you were working for Bay Ridge if you were working for Bay Ridge which employed a lot of gangs, we was working here tonight, maybe 86 tomorrow night, maybe say, "All right, quit, you got to go to the paper ship, the next ship."

Q. What do you mean by 86? A. They had 5, I mean to say we are at 5-no; 97, 96, 95, 86, and they also worked at 68. Now-

Q. What are those? Different piers? A. Those are different piers. So you could be sent to either one, you

know, one or the other.

Q. And you might be told to knock off at the end of a night's work at one place to go to another pier the next night? A. And you might not go either place, no place the next night. And you would call for orders. It was a miracle to know tonight where you would go tomorrow.

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Q. You mean it was an unusual thing that you knew at the end of your night's work where you were going to work the next night? A. If you asked anybody when you went out, they say, "Call for orders"; that is what you got. That was very-once in a while that other occurred, they say, "Come back here tomorrow night, boys."

Q. Did it occur to you on frequent occasions that you worked long stretches beginning at the night shape-up and continuing through the next morning and part of the day?

A. Will you say that again, please?

Q. Did it happen to you on frequent occasions that you started with the night shape-up and worked straight through the night and a considerable portion of the follow- 1527 ing day? A. Oh, I did that, I think quite a few times. I have been in a night and worked through the next day, or any day, worked through the next night. And I recall one time at 86 I think I worked a day at 86, a night at 97, a day until 10 o'clock the next night back at 86. That is the time I bust the boom. I shouldn't forget.

Q. The time what? A. I shouldn't forget it. Bust the boom. They almost hooped me for that, so I shouldn't

forget that.

Q. Well now during the war period was it a common thing for a Bay Ridge gang working in the daytime to stop working at 5 or to work through after 5? A. They didn't stop until-the men just got-

Mr. Taylor: How does he know?

The Witness: What I am talking about, I am talking about myself.

Mr. Taylor: He says he didn't go to longshore after the war.

The Witness: You say before the war?

Q. I said during the war. A. Well, I worked there at night, and they had no reason to stop, or they never did stop particularly; they would let you work as long as you want to or as long as you could.

Q. You continuously worked, starting in the morning, if you started in the morning, and went right through until the job was finished! A. Until the next morning, if you was able to, or until the next night; that is, if the conditions that prevailed—you know what I mean, if they had freight.

Q. If they had freight? A. If they had freight.

Q. If there was loading or unloading on that ship to be done? A. To make it plain, if they had freight and you were dumb enough to work also and continue on. That is the way they would let you do; as long as you were able to keep lifting, you say all right, keep lifting.

Q. Did you ever hear the expression at the end of a period of work "supper and back"? A. That was a common

thing.

Q. What did it mean? A. That was when you worked 11 o'clock; but Bay Ridge didn't do that so much. A lot of other companies did that. For instance, Moore-McCormick was famous for that, because they didn't want to employ a lot of night gangs. Bay Ridge wasn't high on that; they did it occasionally, but not often.

Q. What did that mean with respect to hours? A. You got out at 6, eat and come back to work until 11. So, four

hours you work. 11. Yes.

Q. You go out at 6, eat and you come back and work until 11? A. That is right.

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Q. That is when you were working the day shift? A. That is right.

Mr. Goldwater: That is all.

Mr. Taylor: Your Honor might care to look at the group of papers which is marked Exhibit 8. That exhibit, if your Honor please, is in two parts. There are those sheets which you have immediately in front of you then there is the group of ten pages.

The Court: Which one do you want me to look

at!

Mr. Taylor: I want you to look at both.

Now, on this group of smaller sized sheets, your Honor, Mr. Carrington's page apparently shows one illustration of what he calls out to supper and back to 11, or out to eat and back to 11, whatever it is, on Wednesday of that week. Otherwise in that week he seemed to have worked—well, you see, Monday he worked through the regular day, Tuesday he worked through the regular day.

The Court: What is "L" and what is "LB".?

Mr. Taylor: "L" is "longshore"; "LR" is

"longshoremen handling refrigerated cargo."

The Court: And "LB"?

Mr. Taylor: Where is that? The Court: The first column.

Mr. Taylor: It is "LR" on mine. "LB"?

Mr. Goldwater: I think your Honor hasn't the sheet that Mr. Taylor is referring to.

Mr. Taylor: For Mr. Carrington?

The Court: I have Carrington's.

Mr. Goldwater: You have two different weeks for Mr. Carrington. There must be another sheet there, your Honor, similar in form but a different week for Carrington.

The Court: All right.

Mr. Taylor: While the witness is here we might perhaps says a word about these.

Louis Carrington-For Plaintiffs-Rebuttal-Direct.

The Court: Go ahead.

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Mr. Taylor: You see on the first of those smaller pages which are bound together you have your code.

The Court: I see it.

Mr. Taylor: So that in the case of Mr. Carrington in this particular week, on Monday he worked on refrigerated cargo as longshoremen from 8 in the morning until noon, then from 1 to 5 at \$1.45 an hour. On Tuesday he began at one in the morning.

Mr. Goldwater: That is really 8.

Mr. Taylor: We had to correct that. That should be 8 a. m.

Mr. Goldwater: Will you correct it on your Honor's copy? Will you please correct it to 8 a. m.?

Mr. Taylor: On Tuesday the same thing as on the previous day, except that in the afternoon, on Tuesday, he was working as an ordinary longshoreman and not on refrigerated cargo, which means that the rate was \$1.25 instead of \$1.45. And on Wednesday he worked as a longshoreman, 8 a. m. to noon and 1 to 5 and through the supper hour until 6. And continued on then at 7 on refrigerated cargo until 11 o'clock, giving him 8 hours at \$1.25, one hour at \$1.87½, which was the supper hour, and four hours at \$2.07½, which is the contract overtime rate for refrigerated cargo.

Mr. Goldwater: 5 to 6 is not the supper hour. Ithink you are mistaken, aren't you, Mr. Taylor?

Mr. Taylor: Yes, I am. It is an overtime hour, but not a meal hour.

The Court: All right.

Mr. Taylor: Now, if you will look at the other sheet which relates to Mr. Carrington, which is part of the same exhibit—

Mr. Goldwater: Why don't you follow through that week, because it shows the variation.

Mr. Taylor: If you want me to.

Mr. Goldwater: The witness has testified to Thurs.

day of that week, that he started at 7 p. m.

Mr. Taylor: On Thursday he worked on refrigerator cargo as a header; that is the "Hr" symbol, from 7 o'clock in the evening to midnight, and from 1 o'clock in the morning until 7 in the morning; and on Friday, the following day, he was off until 7 in the evening, when he went to work and worked as a longshoreman on refrigerated cargo and worked until midnight, and continued on that kind of cargo from 1 a. m. to 7 a. m. On the larger sheets which go to make up Exhibit 7 you have a summary for each one of the ten selected plaintiffs, ten or eleven, whatever it is, in the suit against Bay Ridge.

The Court: All right.

Mr. Taylor: You will notice that there are a number of weeks in which there is very little detail given, that is, entries only as to the date on which the week ends, the pier number on which the man worked, his check number, and then over under the column "Total Hours" a figure. As these sheets are made up, where he worked less than 40 hours in the work week the detail is not filled in. So that it is easy to see how many weeks he worked more than 40 and how many weeks he worked less than 40 hours. To get the distribution within the week you look under the various columns. You have the same symbols. which are described in the other part of the exhibit. Under the column headed "A" you get what in the contract is the straight time hours, 8 to 5, except the noon hour. You only get totals, however, and you get the rate; and then you get an extension of the hours times the rate; and then you get, under column "B" the overtime hours under the contract, the applicable rate, and then the extension, the total hours straight time and overtime and the total pay.

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Carl S. Carter-For Plaintiffs-Rebuttal-Direct.

I do not know that these things are particularly important, unless and until we know how we are going to figure this pay, but they are the records which are available and show at least something in connection with the frequency and extent of the work of each one of the selected plaintiffs.

Mr. Goldwater: There is, your Honor, another week shown for this same employee, the one your Honor was looking at before. That, your Honor will see if you will look at it, is an entirely different pattern from the work week of this same plaintiff which Mr. Taylor went through day by day.

The Court: I see it.

(Witness excused.)

CARL S. CARTER, called as a witness on behalf of the plaintiffs in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

Q. Mr. Carter, how long have you worked as a long-shoreman? A. I started in 1922.

Q. How long have you been with Bay Ridge? A. Since 1943.

Q. Did you work days, nights, or both? A. I worked both; right now mostly night work.

Q. Did you work for any extended period regularly only days? A. When we go to New Haven to load ships we work ten to 12 days loading a ship. That is as long as I worked. That was day work, in New Haven.

Q. In New York port did you work long stretches like that on day work? A. No, sir.

Q. Did you work any regularly long stretches of ten to 12 days night work in New York? A. As much as seven nights on a stretch, seven to eight nights on a stretch.

Q. Did you work many long stretches of seven nights?

A. In 1944 there was quite a few of them.

Q. In 1943 and 1944, and up to October 1, 1945, did you work on occasions during the daytime and continue into the night? A. Yes, from 1943 I worked occasions daytime and on into the night.

Q. And did you on occasion, on any of those nights, start at night and work through until morning? A. Start at 7 and work until the next morning?

Q. Yes. A. Yes.

Q. Did you on occasions start at the night shape-up and work through the night and part of the next day? A. All the next day, yes.

Q. You did sometimes work all of the following day!

A. Yes.

- Q. Was that a common or an uncommon thing, for men who worked starting at the night shape-up in the port of New York in the years 1943, 1944 and 1945? Was that a common or uncommon practice, to start at 7 at night and work through the night and part of the next day? A. I do not know whether it was common or not, but I have done it many times.
- Q. Did you work for any companies besides Bay Ridge since 1943? A. No, sir; I worked for Bay Ridge only.

Q. Were you a hatch boss? A. Yes.

Q. Did you have a regular gang that worked with you? A. I had 21 men, but they did not all work with me every night. Some might not come, and I got another man.

Q. But you had to recruit or get together a full gang for every day or night work? A. Every night I had a gang of 21, yes.

The Court: Did you do the picking from the shape?

The Witness: Yes, I picked my own 21 men. The Court: Did that 21 include yourself? 1544

Carl S. Carter-For Plaintiff's-Rebuttal-Direct.

The Witness: No, sir; I was the 22nd man. You count 21 men to work.

Q. Now, did you during these years prefer day work or night work, Mr. Carter? A. Which I prefer?

Q. Yes. A. I would prefer day work.

Q. Did you try to get day work? A. You see, I have a gang, and I was ordered out. If you ordered me at night I came, and if you ordered me in the day I came.

Q. You mean you did not go out to shape until you got ordered out? A. I was called up every evening, to let me know whether I was going to work that night.

Q. Who called you up? A. Mr. Brown.

Q. You have been in the courtroom here while the other witnesses testified? A. Yes.

Q. Is that the Mr. Brown that one of the witnesses said was the big boss? A. Yes.

Q. And you waited until you got orders from him? A. ... He 'phoned every day around 2 or 3 o'clock.

Q. When he did how did you let the men in your gang know they were to come to work that night? A. My men practically had my telephone, and they called me between 4 and 5, and I would tell them what pier we was going to that night.

Q. Did you work many Saturdays and Sundays and holidays during 1943, 1944 and 1945? A. If the work was there we worked.

Q. Would you say that in this longshoremen's work Sundays and holidays were just like any other day! A. Yes.

The Court: You mean there was just as much work available on Sundays and holidays as there was on other days of the week?

The Witness: It was the same. There was no difference from any other day.

The Court: I would like to know whether, as a

matter of fact, there were as many jobs open on Sundays and holidays as there were on other days? The Witness: Bay Ridge was just the same.

The Court: - Was that before the war!

The Witness: Before the war we were coastwise at Pier 25. It was not considered as deep water. I was coastwise.

Q. If you started work on a ship, loading or unloading, on Friday, and the job was not finished at the end of your Friday night shift, did you continue to work during the day on Saturday? A. If I started to work Friday night and 1550 the job was not finished, then I would come back Saturday?

Q. Yes. A. I came back Saturday night, if I was work-

ing on the night shift.

Q. You mean if that ship was not loaded or unloaded by the time the day gang was finished on Saturday, then your night gang returned Saturday night to continue! A. Yes.

Q. And if the ship was not finished when you finished on Saturday night, your Saturday night shift, did you

return on Sunday night to continue? A. Yes.

Q. Would you say then that what determined whether you worked Saturday or Sunday was whether the ship was completely loaded or unloaded, as the case might be! A. If the ship was not finished you came back to work Saturday or Sunday.

C During these nights did you quit on Friday night after a night's work and come back to the same ship on Monday night to work? A. What do you mean, stay over Saturday and Sunday night?

Q. Yes. A. No sir; if you worked Friday night we was back Saturday night.

Q. Until the job was completed? A. Yes.

Q. Did it ever occur, in the course of your experience in the years, that you were told to come down to a 7:55 shape up, and having brought your gang down you found there was no work there? A. Yes.

1552 Carl S. Carter-For Plaintiffs-Rebuttal-Direct.

Q. Did it happen infrequently, or quite a number of times? A. With my gang that did not happen so many times, but we was down quite often, not too many times.

The Court: Occasionally!

The Witness: Yes, occasionally.

Q. Were you told the reason when you got there, or did you see the reason why there was no work when you got there? A. We was told there was no freight, or maybe the ship would not be there; she was expected and she had not come in, or something like that.

Q. When were you told to report back, under those conditions? A. We were told that night. Maybe sometimes they would say to shape at 8 in the morning. I was to call for orders. That was for tomorrow night.

Q. My attention is called to the fact that my question asked whether you went to shape at 7:55. I meant 6:55 at night.

The Court: You meant in the evening!
Mr. Goldwater: I meant in the evening.

Q. That is the regular shape. That is 5 minutes to 7. I intended to indicate the night shape, and that is what hour?

A. Five minutes to 7.

Q. I think I said 7:55. Do you know, Mr. Carter, whether during the war longshore and stevedoring firms in the port of New York worked regularly night time?

Mr. Taylor: He said he worked only for Bay Ridge:

The Court: That is correct.

Mr. Goldwater: Maybe he knows otherwise.

The Court: I have no objection to your question, but as a practical matter I have tables which show.

Carl S. Carter-For Plaintiffs-Rebuttal-Direct.

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exactly how much time was worked day and night, evening, morning, Sunday and Saturday, by a great many concerns; and I am not going to be guided very much by a general impression.

Mr. Goldwater: I withdraw the question.

Q. How long have you been a union member of the LL.A. A. The LL.A. 1936.

Q. You still are! A Yes, sir.

Mr Taylor: No questions.

itness eveneed).

(Witness excused.)

Mr. Goldwater: If your Honor pleases, I have some sheets which are the time sheets for Nathaniel Tolbert, one of the plaintiffs, which were furnished us by Mr. Taylor, as the others were, which are marked Plaintiffs' Exhibit 8, but which came late. They were not quite ready when the others went in. I would like these sheets, showing the weeks worked by Tolbert at the piers he worked and the hours he worked, and the sheets showing the specific hours worked in the week beginning 1557 Monday, March 27, 1944 and ending April 2, 1944, marked as part of Plaintiffs' Exhibit 8.

The Court: All we need to do is incorporate it in the same folder.

Mr. Goldwater: Very well, it simply goes in the same folder.

1558 Nathaniel Tolbert For Plaintiffs-Rebuttal-Direct.

NATHANIEL TOLBERT, called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Goldwater:

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Q. Mr. Tolbert, you live at 246 West 112th Street, New York City! A. I do.

Q. Where are you working now? A. Bay Ridge.

Q. As a longshoreman? A. As a longshoreman.

Q How. fong have you been working there? A. I do not know exactly the date.

Q. Well, approximately; three years, four years? A. About three years.

Q. Did you work for any other concern during the period in 1943-1944, up to October 1, 1945, as a longshoreman?

A. I did.

Q. What other concerns did you work for? A. The Bull line in Brooklyn, and I worked for M. P. Smith out in Bayonne, and in Staten Island I worked for M. P. Smith out there. They had a pier out there.

Q. For Bay Ridge did you work days or nights, or some of both? A. I worked some of both, because I could not get day work. I had to take it when I could get it, and the biggest work there was nights.

Q. Did you shape up days at Bay Ridge on more than one occasion? A. Sometimes I would be working at night and worked through the next day.

Q. Did you ever go to Bay Ridge in the morning to shape up for day work? A. Yes, I did.

Q. Did you get day work? A. I did not get day work, and I came back and shaped up for night work and get night work.

Q. Were you a member of a regular gang at Bay Ridge!

A. A regular gang!

Q. Yes, and did you work with the same group of men, the same gang of men regularly at Bay Ridge! A. Yes, I worked in a gang.

Q. Well, a gang of the same men? A. Yes, the same men.

Q. When you started working nights you say you sometimes worked through into the following day? A. That is right.

Q. And you worked more nights than days? You said mostly nights. A: Mostly nights, because you could not get day work then very much.

Q. How were you advised when there was work to be

done at Bay Ridge! A. I called the union hall.

Q. What would you be told? A. I would be told when there was work there, and sometimes I would go to the pier. I would go down and get a ship. If I called them up and they said no work I would go down to the pier anyway and shape.

• Q. What other piers did-you go to during the years 1943, 1944 and 1945, to look for work and shape up, besides Bay Ridge? A. The Grace Line, the Bull Line, M. P. Smith out

in Bayonne and out in Staten Island.

Q. Were you ever told to come down for a shape up, and when you got there you were told there was no work? A. Yes, sir; I did. I would come down and shape up and got the little badge what they give me and went into the pier, and they had us to shape up to go to work. They sent us out on the pier and they say, "Come back at 9 o'clock". And we come back at 9 o'clock and they say, "You ain't getting no time, come back at 1 o'clock."

The Court: Did that happen often?
The Witness: That happened on two or three occasions down to Bay Ridge.

Q. Are you speaking now of day work or night work?

A. This-was day work, but I have been shaped and went down to do night work at the pier called 10, and did not work, and they sent us back home. We did not go in the

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Nathaniel Tolbert-For Plaintiffs-Rebuttal-Direct.

pier and work. They did not give us no badge, but these times we went in and they give us the badge and they did not give us no work. The timekeeper that checked us in said, "You will not get paid", and sent us out.

Q. You say you have also gone down to shape at night after being told to report? A. After being told to report.

Q. And then found no work! A. That is right.

Q. Were you told on those occasions to come back the same night, or to report the next night? A. When you go down at night to shape and you do not shape at night, they do not tell you to come back that night.

Q. What would you do, wait until you were told to come again? A. No, I would go out the next morning looking

for a shape.

1565

Q. Were you able to find a shape the next morning on frequent occasions? A. No. I did not find no day work much down to Bay Ridge, until we started going to New Haven on the lumber. You know, we was loading lumber ships in New Haven. That was the biggest day work we did. That would be all day work up there.

Q. At New Haven what time did your day work start in

the morning? A. 8 o'clock in the morning.

Q. What time did you get through, regularly, in the evening? A. 7 o'clock at night.

Q. At New Haven did you go through a night when you started on day work? A. No, we did not start-we did not work no nights up to New Haven.

Q. You did not do any night work up there at all? A. Only I think once or twice we was finishing a ship and worked all night to finish, you know.

Q. Did that happen, you say, once or twice only? A.

Once or twice: that is right.

Q. You stayed on the job until the ship was finished? A. Start 8 o'clock in the morning and stay until 7 the next All the gangs did not do that. I think there morning. was only one or two gangs that did that.

Q. Here in the port of New York what other stevedoring companies did you work for besides Bay Ridge?

The Court: He has answered that question twice.

Mr. Goldwater: Has he, your Honor?
The Court: That is my impression. He said
the Bull Line, Staten Island M. P. Smith.

The Witness: That is right.

Q. Did you say whether you worked day or night for the other stevedoring companies? A. At the Bull Line I think it was days, and in Bayonne I worked days for M. P. Smith.

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Q. You worked no nights for the Bull Line? A. Yes, I worked nights out to the Bull Line one or two nights. I say I did work one or two nights out to the Bull Line.

Q. Was that one or two nights work beginning at the evening shape-up, or was it a continuation of the day work? A. No, at the beginning it was the evening shape up. It was not straight through.

Q. Would you prefer to work day or night work? A. I would rather work days if I could get it and make

enough money to live.

The Court: Even if you get better pay at night? 1569
The Witness: Yes, sir; that is why I work at night.

The Court: Notwithstanding, you would rather work days at the lower rate than nights at the higher rate?

The Witness: If I could get it I would rather work days, because nights were made to rest. I would be home with the family.

Q. In your experience as a longshoreman, would you say that there were any regular hours of work at Bay Ridge? A. Not as I know, because if you start and the

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cargo run out or get through with the ship, why, they want to knock you off they do it. You only work about an hour. If you work one hour and they want to knock you off, they knock you off. I went down and worked four hours and they knocked the gang off and there was work there.

Q. You say that there was work there when you were knocked off? A. That is right.

Q. Were you told by the foreman why you were knocked off on such occasions? A. He did not tell. He just said the gang was knocking off. And the reason I say there was work there was because the car we was working was meat. We was working on meat, and there was more meat in the car when we knocked off.

Q. Was that loading meat from the car into a ship? A. Yes; it was taking it into the ship. I was working in the car.

Q. Did you work at Bay Ridge for any single long stretch of nights in a row? A. Yes, I did.

Q. How many nights can you remember working on a single stretch? A. Oh, I guess about 14.

Q. You say you did work in New Haven on day shift!

A. That is right.

Q. Do you recall having worked a full week on day shift and following that working a Saturday morning!

A. That is right.

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Q. By "full week" I mean from Monday to Friday!

Q. And then Saturday morning. A. That is right.

Q. You know what the day rate was? A. \$1.25 an hour.

Q. Do you know what the night rate was, the overtime rate, so-called? A. I know the higher rate they were paying then was \$1.875, but we did not get that for no Saturday morning pay. If you worked 40 hours you did not get that until after 44 hours. That was after 12 on a Saturday they paid us off.

Q. You mean now that you worked at New Haven 40 hours from Monday to Friday during the daytime, between 8 and 5? A. That is right.

Q. And then a Saturday morning for four hours and were not paid \$1.875 for Saturday morning? A. That is right.

The Court: When was that, in 1943?

The Witness: In 1944.

The Court: Do the records sustain him? - You have got his work sheets.

Mr. Goldwater: The time record for this witness would show for the week ended March 19, 1944, a total of 43 hours of straight time and no wage hour adjustment. On the sheet your Honor has in evidence the week ending April 2nd shows 44 hours at \$1.25, with a wage hour adjustment of \$2.50.

The Court: And one week shows no adjustment, and one week does show adjustment; one week right after the other.

Mr. Taylor: Three weeks of this character.

The Court: Is there any explanation of the week which does not show the adjustment?

Mr. Taylor: Surely.

The Court: All right; we will let it be developed. I did not want to impeach the stipulation, but this does not impeach it.

Mr. Goldwater: That is all.

Cross Examination by Mr. Taylor:

Q. Do you happen to know, Mr. Tolbert, on those few occasions when you were working at night for Bay Ridge and they knocked you off in three or four hours, although there was still meat in the car, do you happen to know whether or not after having been knocked off that way at night there were day gangs that finished the thing up and

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Nathaniel Tolbert-For Plaintiff's-Rebuttal-Cross.

got the ship going on her way the next day? A. No, we have been called back that next night. We went in and worked that next night.

The Court: Did you begin just where you left off the night before?

The Witness: No; more work had been going

Q. I do not suppose you could tell us in any such case how much straight time went into the unloading and reloading of the ship, how much overtime? A. No, I could not tell you.

Q. How many day gangs did they have up at New Haven! A. Five.

Q. And it was only one or twice when they put on one or two gangs at night in order to finish up the ship the next morning? A. They did not put those gangs that were working nights on. The day gangs what was working worked right through the night. They did not put on no extra gangs.

Q. That happened once or twice? A. That happened once or twice.

Q. And when it did happen they took one or two gangs, 1578 day gangs, and worked through the night? A. Yes.

By the Court:

Q. When you worked at New Haven you stayed over there? A. I came home every night.

Q. How long did it take you to come back? A. About two hours, or an hour and 45 minutes, but the gang stayed up there.

Q. All your other workers drove back? A. No, the boss and a few of us.

Q. The others stayed up there? A. We drove back every night and up there every morning for the shape.

By Mr. Taylor:

Q. When you worked for Bay Ridge you were always employed at one of the shapes that occurred during the

day! A. Employed during the day!

Q. No, no; I mean you were always hired out of the shape. When you worked for Bay Ridge you were picked out of a shape and hired that way? A. What do you mean, when I go to the pier to shape?

Q. That is right. A. Yes, I shape at Bay Ridge.

Q. You never were hired in any other way? A. No,

I never was hired no other way.

Q. And the men who were in the same gang that you happened to be working with, also always have been picked out of the shape, just the same as you? A. We was working in that gang and they get hired down to the

pier. They get shaped at the pier.

Q. You are telling us that all of the time you were at Bay Ridge all of the fellows that were in the first gang you ever worked with were in the gang with you every other time you ever worked? A. Not every time in that gang, not all the men every time, but some of them. The same hatch boss was there. You cannot keep the same men unless you got regular work for them, because they go from pier to pier looking for work, and there aint no such thing as regular work. You got to look for jobs at other piers, when you don't get it, when you are shaping up at that pier.

Q. The gangs that you had up at New Haven, were they New Haven men or New York men? A. Four of the gangs was from New York that shaped right down to 95, and they had buses taking them up there. They would send buses to take them up there and bring them back when the ship was finished. The majority of the men in the other gang lived in New Haven. They called that the New Haven gang, and four gangs were from down-

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Nathaniel Tolbert-For Plaintiffs-Rebuttal-Cross.

·Q. What day of the week did you start to work the New York gangs? Did they always start on a Monday? A. We would shape up on a Monday morning.

Q. And go up in a bus! A. And go up in a bus.

Q. And how long would you stay there! A. I stayed up there for three ships. I mean worked on three ships straight.

The Court: One right after the other?
The Witness: One right after the other.

Q. I do not mean you, I mean the gangs. A. Those gangs that go up would work three ships, one right after the other, but the majority of the time we would only have one ship and we would only work from eight to ten days. It would take eight to ten days to finish the ship, depending on the size of the ship.

Q. As soon as the ship was finished, then they would

come back to New York? A. That is right.

Q. In New York the work week for Bay Ridge was Monday to Monday, and you were paid that following Friday! A. Yes.

Q. How was it up in the New Haven gang? A. It was not like that all the time we worked up there.

Q. How was it? A. Of course they were paid off on a Thursday sometimes up there. They made the payroll up like that. They did this time those three ships was up there. They paid off different times.

Q. Why was that? A. I don't know.

Q. Wasn't it because the men wanted to be paid on Thursday! A No, it was not because the men wanted to. The men could not tell the company how to pay them off.

Q. You were not paid on a Monday to Monday week up there? A. We was, after this last contract. After that they paid off up there just like down here.

The Court: Where were you paid, in New Haven or New York?

The Witness: In New Haven.

Q. Which contract do you mean? A. October 1, 1945.

Q. Before that you got paid up there on days other than Fridays? A. That is right.

Q. And are you able to say whether or not in these weeks in which you got a wage and hour adjustment, or did not get it, your pay was figured from Monday to Monday, or whether it was figured on a different work week? A. It was figured on a different work week. Some of the time we was up there, I do not say all the time, at least they paid us different from that.

1586

Mr. Taylor: If your Honor wants to look at the copy of this thing in the case of Mr. Tolbert, you will see on the first page of the large sheets relating to his employment record that, unlike any other records of any of the plaintiffs, you have special dates inserted whenever he worked at New Haven. Do I make myself clear?

The Court: You mean, for instance where it says

March 12.

Mr. Taylor: Yes, with respect to work at New Haven, which is noted under the column entitled "Pier No." You always have some dates. You. 1587 never have dates with respect to any work done elsewhere than at New Haven.

The Court: All right.

Mr. Taylor: And I do not know the answer to it, but I think it is related to that in some way.

The Court: You will be able to analyze that out in your brief.

Mr. Taylor: I think it can be analyzed out, and I think that it is due to the fact that the wages were figured on some other work week up there.

Q. Were you given an allowance for subsistence, to live on, so much for eating, hotel and board, and so forth,

Colloquy.

when you went up to New Haven? A. Yes, in your pay you got \$2 a day when we first started to work up there, and later on they raised it to \$2.50. You got that in your envelope.

By the Court:

Q. In addition to your pay? A. In addition to your pay.

Q. Per day! A. Per day.

(Witness excused.)

1589

Mr. Goldwater: I would like to offer, your Honor, a portion of Monthly Labor Review, Volume 57, No. 1, July, 1943, United States Department of Labor, Bureau of Labor Statistics, entitled "Wage and Hour Statistics, Pay Differentials for Night Work under Union Agreements."

The Court: Is there any objection?

Mr. Goldwater: You don't have to read the whole

article to state whether you object to it or not.

Mr. Taylor: Having in mind what your Honor has told us so repeatedly about the extent of your investigations in trying to decide this case, I think I know what would happen to my objection.

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The Court: Oh, if you mean would I read the article and then sustain the objection, the answer is yes. I would probably read the article, anyway. It might make a difference whether it is in evidence or whether it is purely background material.

Mr. Taylor: The only reason I was taking time to read it is because without so doing I could not tell whether I might want to try to put in anything in reply.

Well, I will object.

The Court: Objection sustained.

Mr. Goldwater: If your Honor please, I would like to press the offer.

The Court: First you have to sustain its competence,

and I assume that the objection embraces the objection of competence.

Mr. Goldwater: Well is there any question that this is

a true copy, Mr. Taylor!

The Court: Of what? A. Of an article somebody wrote:

Mr. Goldwater: This is an official issue of the United

States Department of Labor.

The Court: Yes, I know the Monthly Labor Review. It is nothing more than a journal, published by the Bureau of Labor Statistics. It falls in the same class as the National City Bank monthly review, or the Harvard Law Review, or the New York Law Journal.

Mr. Goldwater: I think that your Honor, if I may say

so, is mistaken.

The Court: It contains certain statistical tables as well. It also contains articles. I don't know which part you are showing him. But I have read the Monthly Labor Review for many years. Mind you, I am quite prepared to read it as I would an article in one of the law journals.

Mr. Goldwater. I understand; but I am cognizant of the fact that your Honor pointed out that there is a vast difference between your Honor reading it and something

being admitted in evidence,

The Court: That is correct.

Mr. Goldwater: That is why I press my offer. I say this is an official record, and that an official record may be evidenced by an official publication thereof. Now if the only question here is whether or not a photostatic copy—

The Court: What is this? Is this statistics or an

article written by somebody?

Mr. Goldwater: It is both; it is a combination. There is comment and there are statistics.

Mr. Taylor: It is entitled, if your Honor please. "Pay Differentials for Night Work under Union Agreements."

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There is a footnote that says, "Prepared in the Bureau's Industrial Relations Division by Constance Williams."

Mr. Goldwater: That is right.

Mr. Taylor: She is alive and available

Mr. Taylor: She is alive and available if you want to

Mr. Goldwater: It must be prepared by somebody.

The Court: I treat that the same as I would an article in the Harvard Law Review by a smart fellow, and it is persuasive or not depending upon its inherent persuasiveness. But it is hardly evidence.

Mr. Goldwater. The objection which is now made in Mr. Taylor's argument against its admission is not on the basis of its competence as evidence, he is not objecting to it as incompetent, that is, in the sense that this is not a true copy of an official record, if this is an official record. If he is making an objection that I am handing him a photostatic copy and not a copy issued by the department itself, then I will get a copy issued by the department itself.

The Court: I am sure that is not the basis of the objection.

Mr. Taylor: Not at all; except, of course, I don't know whether it is all of the article. It ends with Table I. There may be Tables II, III, IV and V, and all sorts of additional textual matter. All I have is the photostatic sheet.

Mr. Goldwater: That is right,

The Court: It seems to me the objection is to the question as to whether it is evidence of anything. What is it

Mr. Goldwater: If the objection was on that ground and your Honor sustains it on that ground—

Mr. Taylor: It is on any ground.

Mr. Goldwater: —I am quite content to make my offer and have it marked for identification. I am trying to clear up that that is the ground for objection, and not the fact—

The Court: That it is a photostat?

Mr. Goldwater: That it is a photostat and not in the original form.

The Court: I assume also that Mr. Taylor waives any formality of exemplification and certification, and so on.

Mr. Taylor: Yes.

The Court: If there be any such requirement.

Mr. Taylor: Yes, sir. I do not question but what this is an accurate photostat of some existing pages in some existing publication.

The Court: Of an article published in the Monthly Labor Review by Miss Constance—what?

Mr. Taylor: Williams.

Mr. Goldwater: Not published by her. It is an article issued by her.

The Court: By the Bureau of Labor Statistics, prepared by Miss Constance Williams.

Mr. Goldwater: That is correct. I would like it marked for identification.

The Court: Have it marked for identification,

(Marked Plaintiffs' Exhibit 15 for identification.)

Mr. Goldwater: I would like to offer now a bulletin of the United States Labor Statistics, No. 550, entitled "Cargo Handling and Longshoremen Labor Conditions," of February, 1932.

Mr. Taylor: I object.

Mr. Goldwater: This again is a photostatic copy, your Henor, the same as the last exhibit offered.

Mr. Taylor: I object on the ground that it is incompetent.

The Court: The same objection; it is of the same character?

Mr. Taylor: Yes, sir. Mr. Goldwater: Yes, sir.

The Court: Then I will treat it in exactly the same way, to which I understand you have no objection.

1598

Colloguy.

Mr. Goldwater: I assume that your Honor recognizes that this exhibit, and the previous one, appear from the print stamp on it to have been printed in the United States Government Printing Office in Washington.

The Court: Yes, I understand that.

Mr. Goldwater: I would like to have it marked for identification.

The Court: So is the Congressional Record; but it is not yet contended in this court that that constitutes evidence as to its contents.

(Plaintiffs' Exhibit 16 marked for identification.)

Mr. Goldwater: I now offer Volume 37, No. 6, Monthly Labor Review, United States Department of Labor, Bureau of Labor Statistics, issued by the United States Government Printing Office in Washington, in December, 1933, an article entitled "Unemployment Conditions and Unemployment Relief." subtitle, "Longshore Labor Conditions" and Port Decasualization?'

Mr. Taylor: The same objection.

The Court: The same disposition. Mark it for identification.

1602

(Marked Plaintiffs' Exhibit 17 for identification.)

The Court: If you will make copies of these available to me I will be glad to read them.

Mr. Goldwater: I will be very glad to, sir.

Mr. Taylor: Let me hand up my "Insolvency Study" then; may If

The Courts Of course.

Mr. Taylor: I call it an "Insolvency Study" (handing to' Court).

Mr. Goldwater: I would like to offer now a letter addressed by L. Metcalfe Walling, Administrator of the

Wage and Hour Division, Department of Labor, addressed to Vernon Williams, vice-president of the Cleveland Stevedore Company, Cleveland, Ohio, under date of May 14, 1943, which copy of letter was furnished to us at our request, having identified the letter, by Mr. Taylor, and which, therefore I assume he will stipulate is a true copy of the original letter.

Mr. Taylor: There is no question about that.

Mr. Goldwater: I offer this letter in evidence, but would state for the record that the plaintiffs by this offer do not wish it to be understood that there is acquiescence in the opinion of the Administrator contained in the second paragraph in the last of page 2 with respect to the crediting of payment for Sundays of holidays.

The Court: In other words, you are impeaching your witness.

Mr. Goldwater: I am not impeaching him at all. I am offering it in evidence because it is an opinion of the Administrator on this subject, which I think is certainly relevant and material and informative; and at the same time I think I have a perfect right, although I am offering it for that purpose, to disagree with the conclusion and to point out to the Court why in a brief.

The Court: Any objection?

Mr. Taylor: Yes, I have, sir. In addition to the normal objections that it is incompetent, irrelevant and immaterial, I want to make some particular objections; first, that it is not part of rebuttal, it is properly part of the plaintiffs' case. Here we are, at five minutes past 11—

The Court: If you plead surprise I will consider giving

you an opportunity to surrebut.

Mr. Taylor: I do not plead surprise in the sense that I don't know about the letter. I furnished it to him, as he has stated. But he is bringing it in at this time in the case, after all the oral witnesses are gone, and he brings it in as rebuttal testimony; it is obviously part

1604

Colloguy.

of his direct case. If he wishes to rely upon administrative opinions, why, I think that is part of his direct case.

As a further objection I would like to say that it is not addressed to any of the parties in this case, nor to any stevedoring company in the port of New York or in the Atlantic area covered by the I. L. A. contracts. It is addressed to a stevedoring company out in Cleveland. And if your Honor feels that you should go into it, you should read it, you will see that it refers to various contracts out on the Great Lakes. The contracts are not, so far as I know, offered by Mr. Goldwater along with the letter; there purport to be references in the letter as to what the contracts state. I suggest to you that, with the utmost sincerity, the contracts are not as stated in the letter, and that the whole thing is completely misleading. There is no evidence that any knowledge of it was brought home to the people here in this case or in this court, or affected in any way.

The Court: Has this letter been published by the Ad-

ministrator as a ruling or interpretation?

Mr. Taylor: No, sir.

Mr. Goldwater: It is a ruling or interpretation, as may be seen on its face.

Mr. Taylor: It was mailed; that is what he means.

The Court: Doesn't the Administrator, the Wage and Hour Administrator, have a formal system of rulings and interpretations?

Mr. Taylor: Certainly.

Mr. Goldwater: Oh, he has a formal system in the sense that he publishes interpretations. He also issues them in letter form where inquiry is asked. And where it pertains to the stevedoring business, as it does in this case, I think your Honor may well take it, because the Supreme Court has frequently said that his opinion is entitled to great weight.

Mr. Taylor: They have not said that.

Mr. Goldwater: Oh yes.

Mr. Taylor: I think I might add as a further observation that in any case it is proper for the Court to decide how far it is going into collateral issues. The significance of the statements in this letter, as helpful or controlling or official in one way or another in our case, cannot be discerned without a full study of the Cleveland and Great Lakes situation and all the contracts out there which are involved.

The Court: Well I will look at it.

Mr. Goldwater: On the question, your Honor, of whether or not this is rebuttal—

The Court Well let us not spend time on that, because the worst that can happen with respect to that is that your adversary may be entitled to an opportunity to offer additional evidence.

Mr. Goldwater: Well there is a statement or opinion here as to the vagaries of the stevedoring business, which addresses itself specifically to testimony offered by the defendants as to regularity or irregularity.

The Court: Well I suppose everything that you have said, Mr. Taylor, goes to the weight of this instrument. It is an opinion expressed by the Administrator, and to the extent it is relevant I think I am entitled to consider it. I will receive it. As a matter of fact, I don't think it needs to be offered in evidence, but I will receive it. If this were published in one of the regular publications of the Wage and Hour Administrator it would not have to be offered in evidence; it would be material which I could have access to, the same as I can have access to a decision of the United States Supreme Court in any particular case.

Mf. Taylor: Yes; but it has not-

The Court: It has not been published and therefore it has to be qualified. It has been qualified as a general letter.

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Mr. Taylor: There is another thing I can't understand, and that is how a party can offer a letter on the ground on which it is offered, that it is an Administrative ruling, and they offer it as to the part that they like and they don't offer it as to the part that they don't like.

The Court: He is offering it as to all of it? He is announcing that he does not agree with it. But it is all

in evidence. Objection overruled.

(Marked Plaintiffs' Exhibit 18.)

The Court: You might of course, and I assume you will, call my attention to the fact that all these years have gone by and that the Administrator has taken no action to interfere with the practice which has prevailed.

Mr. Taylor: I am going to do some other things in a moment, now that your Honor has opened up this question at this stage of the case that I did not suppose would

happen.

Mr. Goldwater: I offer now a letter dated August 17, 1945, written by William R. McComb, Deputy Administrator, Wage and Hour Division, United States Department of Labor, addressed to Mr. H. K. Swenerton, Wage 1614 and Hour Salary Administrator, Consolidated Vultee Aircraft Corporation.

Mr. Taylor: May I see it?

The Court: Is there any objection?

Mr. Taylor: Yes, your Honor. The Court: The same ground?

Mr. Taylor: 'Yes.

The Court: The same issue!
Mr. Taylor: Yes, your Honor.
The Court: The same disposition.

Mr. Taylor: I might add, seeing that your Honor has not seen this and I only this moment glanced at it, that this is not in our industry. It relates apparently to air

craft out in San Diego, California, under a shift system. The Court: He is in effect offering citations, and he is offering them in evidence.

(Marked Plaintiffs' Exhibit 19.)

Mr. Goldwater: Plaintiffs rest.

Mr. Taylor: May it please the Court, I wish to offer notarized copies of contracts out on the Great Lakes which are involved in the first ruling which was offered by Mr. Goldwater.

The Court: Is that all, or is it going to open up any

more!

Mr. Taylor: I have some more.

The Court: On the same subject?

Mr. Taylor: Oh yes. I have some really good rulings that I stand by all the way through.

The Court: In other words, he is offering statements of facts that precede the opinion that you have offered in evidence. I will take it.

Mr. Goldwater: What are these?

Mr. Taylor: These are the contracts between the Cleveland Stevedore Company and Local No. 1317 of the I. L. A. referred to in the letter from Mr. Walling to 1617 Mr. Vernon Williams, dated May 14, 1943.

Mr. Goldwater: There is no objection on the part of the plaintiffs. We want your Honor to have all of the facts.

(Marked Defendants' Exhibit M.)

Mr. Taylor: I next offer as one exhibit two letters, one from the Industrial Association of San Francisco to Miss Dorothy Williams, Pacific Coast Regional Counsel of the Wage and Hour Division, December 1, 1938.

The Court: Is the Regional Counsel authorized to issue interpretative bulletins?

Colloquy.

Mr. Taylor: Yes; they do.

Mr. Goldwater: I am sorry, but our answer would be in the negative, your Honor. We must object on that ground alone.

The Court: Let us hear what else you have.

Mr. Taylor: And the reply of Miss Williams, or the reply of the Regional Director, Mr. Wesley O. Ash, dated December 6, 1938, in reply to the letter addressed to Miss Williams dated December 1, 1938.

The Court: You may now argue, or later argue, as to

whether the Regional Counsel-c-o-u-n-s-e-l?

Mr. Taylor: No; Regional Director.

The Court: —has power duly delegated to him to issue opinions.

Mr. Goldwater: I don't know the answer to that.

Mr. Taylor: You will find a lot of them published that way, I mean, in the Wage and Hour reported services of one sort or another you will find letters printed. Unfortunately, this one does not happen to be printed.

The Court: Subject to your proving the proposition

that that person has authority-

Mr. Goldwater: Where is the burden here?

The Court: The burden is upon the offeror of that evidence.

Mr. Goldwater: The objection is noted on the ground that there is no authority in the person who purports to issue this letter to issue opinions.

The Court: You don't mean that person. You mean the Regional Director. You are not questioning that he

is Regional Director.

Mr. Goldwater: I mean, not the title of the person; that he has authority to issue opinions.

The Court: I will receive it, subject to his demonstrating in his brief whether he has such authority. Exhibit N received, subject—

Mr. Goldwater: May I see the exhibit first!

I object on the further specific ground, your Honor, that there is nothing in either of the two letters mentioned which would indicate that the purported opinion, if authoritatively issued has any reference to the stevedoring business or longshore employment.

The Court: That would go to its weight. I suppose. if it were an opinion which covered the situation generally I would still be entitled to consider it., It is an

interpretation of the Wage-Hour Act in some aspect.

Mr. Goldwater: It is undoubtedly that. By somebody. The Court: And Mr. Taylor thinks that it has bearing. . That is what it amounts to.

Mr. Goldwater: That is right.

Mr. Taylor: When you started this, you sort of opened the gate. I did not start it, Mr. Goldwater started it.

Mr. Goldwater: Yes; but what I had offered had definite reference to the longshore business and longshore employment.

The Court: I am now applying the rule commended upon me by the Circuit Court; Take it in; the damage from taking it in is always less than that from keeping it out.

Mr. Goldwater: All right. I have noted my objection. 1628 The Court: It is received, subject to showing me of course in your brief that there is authority in that person to issue interpretations and opinions.

(Marked Defendants' Exhibit N.)

Mr. Taylor: I now offer a letter dated December 21, 1945, addressed to Mr. Claude W. Brown, vice-president of Marine Clerk Association, Local 63, in Long Beach, California, relating to the computation of wages under the Act, under an agreement very similar to ours, having different rates of pay, \$1.20 rate and \$1.30 rate, with

overtime in each instance, time and a half of the straight time rate, and also containing an answer to the question as to what happens when a man has worked more than 40 night hours at the contract overtime rate.

The Court: Who is the author of the letter?

Mr. Taylor: This one is signed by W. R. McComb, Deputy Administrator.

The Court: All right. Same disposition.

Mr. Goldwater: Your Honor, the objection there is that this has no relevance, because the Administrator says that since there are several open matters involving longshoremen employees and government contracts he deems it inadvisable to answer the question at this time.

The Court: I should think you would want it in.

Mr. Goldwater: It is burdening the record, and it is a sheet of paper which means nothing.

The Court: It means that the Bureau has reserved

Mr. Goldwater: It certainly gives no advice to the Court, and no assistance.

The Court: He is advising about the fact that the Administrator has not taken a position.

Mr. Goldwater: All right, if your Honor feels that it is advisory I have no objection to your having it.

The Court: All right.

(Marked Defendants' Exhibit O.)

Mr. Taylor: I doubt if this need be marked as an exhibit. I would like to hand you a copy of the printed Interpretive Bulletin No. 4, published by the Administrator of the Wage and Hour Division, and the two press releases No. 1913 and B-1913A which deal with the so-called alternative method of computation.

. The Court: I will take them. You don't have to mark them.

Colloquy.

Mr. Taylor: I think that is all, sir.

Mr. Goldwater has very graciously stipulated with respect to the letter which I offered addressed to Miss Dorothy Williams and a copy of her reply, that Mr. Lyon, the president of the New York Shipping Association, would testify if called that he received, within a short time after they were written, a copy of each of those

The Court: I am glad to have the stipulation.

All right, both sides rest. We have fixed a time for briefs.

eletters.

(Conference at the bench between Court and counsel.)

Plaintiffe' Exhibit 5.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-212.

1631

- LEO BLUE, et ali.,

Plaintiffs,

HUBON STEVEDORING CORP.

Defendant

STIPULATION TO SEVER THE ACTIONS OF CERTAIN SELECTED PLAINTIPPS

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court:

1632 (1) That the actions of the following named plaintiffs,

Leo Blue

Nathaniel Dixon Christan Elliott Tony Fleetwood James Fuller Joseph J. Johnson Sherman McGee Joseph Short Whitfield Toppin Alonzo Steele are hereby severed, for the purpose of immediate trial, from the actions of the other plaintiffs named in the caption of the complaint;

(2) That the actions of the other plaintiffs named in the caption of the complaint shall remain pending in the files and upon the docket of this Court until final disposition of the severed actions in this Court and in any court to which they may be carried on appeal or upon certiorari, and until the final disposition of said severed actions pursuant to the mandates of such higher courts;

1634

- (3) That this severance shall not prejudice in any way the rights or actions of any of the remaining plaintiffs named in the caption of the complaint, nor the rights or defenses of the defendant, nor have any effect except as stated in the next paragraph.
- (4) That the legal rules and principles established by such final disposition of the severed actions shall apply in the actions of the remaining plaintiffs named in the caption of the complaint with respect to such issues in the remaining actions as fall within the legal rules and principles, so established;

- (5) Notwithstanding the severance and immediate trial of the severed actions of the plaintiffs named above, jurisdiction of the actions of the remaining plaintiffs named in the caption of the complaint shall continue in the trial court subject to direction of the trial judge;
- (6) Determination of a reasonable attorney's fee, if the plaintiffs named above ultimately recover, shall be left to the trial judge after ultimate disposition of oth the severed actions and the remaining actions;

Plaintiffs' Exhibit 5.

(7) The severance provided for by this stipulation shall not be made, in and of itself, the basis of an objection by either party to the admission of evidence otherwise relevant.

June 17, 1946 (Date) GOLDWATER & FLYNN and MAX B. SIMON,

by Monroe Goldwater, Attorneys for Plaintiffs.

1637 June 17, 1946 (Date)

John F. X. McGohey, United States Attorney.

By MARVIN C. TAYLOR, Attorneys for Defendant.

Approved:

Simon H. RIFKIND, U. S.-D. J.

Plaintiffs' Exhibit 6.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-213.

JAMES AARON, et ali.,

Plaintiffs, 1640

BAY RIDGE OPERATING Co., INC.,

Defendant.

STIPULATION TO SEVER THE ACTIONS OF CERTAIN SELECTED.
PLAINTIFFS

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court:

(1) That the actions of the following named plaintiffs,

James Aaron
Albert Alston
James Brooks
Louis Carrington
James Hendrix
Austin Johnson
Albert Green
Carl Roper
Mars Stephens
Nathaniel Tolbert

Plaintiffs' Exhibit 6.

to the extent of that portion of their claims arising out of their employment by the defendant during the year 1944; are hereby severed, for the purpose of immediate trial, from the claims of these plaintiffs arising out of their employment before or after 1944, and from the actions of the other plaintiffs named in the caption of the complaint.

- (2) That the actions of the plaintiffs named in paragraph (1) above arising out of their employment before or after 1944, and the actions of the other plaintiffs named in the caption of the complaint, shall remain pending in the files and upon the docket of this Court until final disposition of the severed actions in this Court and in any court to which they may be carried by appeal or upon certiorari, and until final disposition of said severed actions pursuant to the mandates of such higher courts.
- (3) That this severance shall not prejudice in any way the rights or the actions of the plaintiffs named in paragraph (1) above arising out of their employment before or after 1944, nor the actions of any of the other plaintiffs named in the caption of the complaint, nor the rights or defenses of the defendants, nor have any effect except as stated in the next paragraph.
- (4) That the legal rules and principles established by such final disposition of the severed actions shall apply in the actions of the plaintiffs named in paragraph (1) above growing out of their employment by the defendant before or after 1944, and in the actions of the remaining plaintiffs named in the caption of the complaint, with respect to such issues in the remaining actions as fall within the legal rules and principles so established.
- (5) Notwithstanding the severance and immediate trial of the severed actions of the plaintiffs named above, jur-

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isdiction of the actions of the remaining plaintiffs named in the caption of the complaint, and of the actions of plaintiffs named in paragraph (1) above growing out of their employment by the defendant before or after 1944, shall continue in the trial court subject to direction of the trial judge;

(6) Determination of a reasonable attorney's fee, if the plaintiffs named above ultimately recover, shall be left to the trial judge after ultimate disposition of both the severed actions and the remaining actions;

1646

1647

(7) The severance provided for by this stipulation shall not be made, in and of itself, the basis of an objection by either party to the admission of evidence otherwise relevant.

June 17, 1946 -(Date) GOLDWATER & FLYNN and MAX R. SIMON,

by Monroe Goldwater, Attorneys for Plaintiffs.

June 17, 1946 (Date)

John F. X. McGoney, United States Attorney.

By Marvin C. Taylor, Attorneys for Defendant.

Approved:

Simon H. Rifkind, U. S. D. J.

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Plaintiffs' Exhibit 7.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-212.

LEO BLUE, et ali.,

1649

Plaintiffs,

HUBON STEVEDORING CORP.,

Defendant.

STIPULATION AS TO THE EMPLOYMENT AND PAYMENT OF THE SELECTED PLAINTIFFS.

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court:

- The attached pages may be received as evidence of the facts therein stated, with respect to which the following explanations are made:
 - (A) These pages are not copies of original records of the defendant. They were specially prepared for the purpose of presenting to the Court in concise form the material facts which are recorded thereon as to the employment and payment of the plaintiffs. The facts recorded on these pages are accurate statements of information appearing on the defendant's original records.
 - (B) There is one group of pages relating to each plaintiff, which show the following facts with reference to his employment and payment.

- (1). There are two lines for each workweek during which the plaintiff did any work for the defendant during the period covered by the complaint. The workweeks began and ended at 8 A. M. Wednesday until the week beginning July 5, 1943, at and after which the workweeks began and ended at 8 A. M. Monday. The timekeeper's day runs from 8 A. M. to 8 A. M. Thus, under the heading "Monday", for example, the entries cover the hours worked between 8 A. M. Monday and 8 A. M. Tuesday.
- (2) On the lines bearing the symbol "A" are entered the total number of hours worked in that workweek between 8 A. M. and 12 noon and 1 P. M. and 5 P. M., Monday to Friday, inclusive, and 8 A. M. and 12 noon on Saturdays, except when any of these days is a holiday, and with the further exception that if the plaintiff had already, in the same workweek worked 40 hours between 8 A. M. and 12 noon and 1 P. M. and 5 P. M., Monday to Friday, inclusive (none of such days being a holiday), all his Saturday morning work is entered on the line bearing the symbol "B."

(3) On the lines bearing the symbol "B" are entered the total number of hours worked by the plaintiff each day and not entered on the line bearing the symbol "A."

(4) Where no rate of pay follows the entry of the number of hours worked, the plaintiff was working as a longshoreman handling general cargo at the rate of \$1.25 per hour, if on line A, or \$1.87½ per hour, if on line B. If he worked on other types of cargo, such as ballast or cement for example, or if

1652

Plaintiffs' Exhibit 7.

he was a longshoreman temporarily assigned as a "Header", or "Gangwayman" or "Assistant Foreman" to part of the work requiring more than usual skill, the rate of pay actually paid him for such work is entered after the number of hours shown for that work that day. There is a separate entry for each kind of cargo and position, if the plaintiff worked in more than one position or on more than one type of cargo.

- 1655

 (5) The total hours shown on the lines A and B, respectively, are entered in the column captioned "Total Hours" and the sum of the figures for each week so entered is the total of all hours worked in that week including all positions and all cargoes.
 - (6) Under the caption "Wages" appears the total sum of all items of pay for that week after computation by extension of the hours and rates recorded for that week.
 - (7) Wherever it appears in the attached pages that a plaintiff worked eleven hours on a Sunday, those hours were worked between 7 P. M. Sunday and 8 A. M. Monday; wherever it appears that a plaintiff worked eleven hours on a Saturday, those hours were worked between 7 P. M. Saturday and 8 A. M. Sunday; wherever it appears that a plaintiff worked eleven hours on any holiday, those hours were worked between 7 P. M. on the particular holiday and 8 A. M. the following day.

The foregoing provisions shall be deemed limited in the case of the Plaintiff Tony Fleetwood to the following extent:

On August 15, 1943 Tony Fleetwood worked from 8 A. M. to 12 noon, and from 1 P. M. to 8 P. M.,

Plaintiffs' Exhibit 7.

1657

1658

making up the eleven (11) hours worked by him in that particular day.

June 17, 1946

(Date)

GOLDWATER & FLYNN and MAX R. SIMON.

by MONBOE GOLDWATER, Attorneys for Plaintiffs.

June 17, 1946 JOHN F. X. McGOHEY. (Date)

United States Attorney. By MARVIN C. TAYLOR,

Attorneys for Defendant.

Approved:

SIMON H. RIFKIND, U. S. D. J.

Records omitted.

(One copy of attached records to be handed up pursuant to stipulation.)

Plaintiffe' Exhibit 8.

IN THE

DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-213.

JAMES AARON, et ali.,

Plaintiffs,

1661

BAY RIDGE OPERATING Co., INC.,

Defendant.

STIPULATION AS TO THE EMPLOYMENT AND PAYMENT OF THE SELECTED PLAINTIPPS

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to the approval of this Court.

The attached pages numbered 1 to 25, both inclusive, may be received as evidence of the facts therein stated, with respect to which the following explanations are made, viz:

- 1662
- (A) These pages are not copies of original records of the defendant. They were specially prepared for the purpose of presenting to the Court in concise form, the material facts which are recorded thereon as to the employment and payment of the plaintiffs. The facts recorded on these pages are accurate statements of information appearing on the defendant's original records.
- (B) In the group of sheets numbered 1 to 15, inclusive, those bearing the name of each plaintiff record the following facts with reference to his employment and payment during every week in which he worked for the defendant during 1944.

- (1) Under the caption "Week Ended", appears the date of the last day of every workweek in which he worked for the defendant in 1944. The workweek began and ended at 8 A. M. on Mondays.
- (2) Under the caption "Pier No.", appears the number of the pier or piers at which he worked that week.
- (3) Under the caption "Check No.", appears the number of the "brass check" which was given to him at the time of his first work in any given workweek and was surrendered by him for his pay envelope on the payday (Friday) following the end of the workweek.
- (4) Under the caption "Occupation Symbol", appear various symbols to indicate the plaintiff's position and the kind of cargo on which he was working. Where a plaintiff worked in more than one position in any workweek a line is taken for each position, with its appropriate designating symbol. The symbols appearing on these sheets are as follows:

Symbol	Position	Cargo
ь	Longshoreman	General
L-B		Bulk; Coal
L-CT		Cement
L-R	**	Refrigerator
L-DMG	46	Damaged
H•	Headers	General
H-B		Bulk, Coal
H-R	44	Refrigerator
AF*	Asst. Foreman	General
AFR	16	Refrigerator
P	Painter	
TT	Travel Time	

^{*}Headers and Assistant Foremen are longshoremen temporarily assigned to parts of the work requiring more than usual skill.

Plaintiffs' Exhibit 8.

- (5) Under the caption "A" is stated the total number of hours worked that workweek between 8 A. M. and 12 noon and 1 P. M. and 5 P. M., Monday to Friday, inclusive, and 8 A. M. to 12 noon on Saturday, except when any of these days is a holiday. A separate line is taken for each kind of cargo and position, if the plaintiff worked in more than one position or on more than one kind of cargo; and this is indicated by the entry of the appropriate symbol on the same line.
- 1667 (6) Under the caption "Hourly Rate-A" are stated the rates of pay actually paid for the position and type of cargo indicated in column "A" by the symbol on the same line.
 - (7) Under the caption "Total Pay for Work in Golumn A", appears the extension of the pay actually paid on the basis of the entries in the two preceding columns, and also an entry of the amount actually paid as a "Wage & Hour Adjustment", described in paragraph D below, whenever such adjustment was made by the defendant.
 - (8) Under the caption "B" there is recorded the number of hours worked in each workweek during hours not entered in column A. The position and the cargo are indicated by the symbol on the same line.
 - (9) In the next column, captioned "Hourly Rate-B" are stated the rates of pay actually paid for the position and pe of cargo indicated in column "B" by the symbol on the same line.
 - (10) The next column, captioned 'Total Pay For Work in Column B' contains the extension of the pay actually paid on the basis of the entries in the two preceding columns.

- (11) In the next column, captioned "Total Hours" Pappears the total of all hours worked in that week, including all positions and all cargoes.
- (12) Under the caption "Total Pay" appears the sum of all items of pay entered for that week in the columns "Total Pay For Work in Column A" and "Total Pay For Work in Column B."
- (13) The final column notes the amount of "Total"
 Hours" in excess of 40 in that workweek.
- (14) The detailed information called for in the columns described in the preceding paragraphs B(1) to B(10), inclusive, is given only for those workweeks in which "Total Hours" were more than 40. With respect to weeks in which the plaintiff worked not more than 40 hours, the sheets record only the closing dates of such weeks, the place of work, his brass check number of the week, and the total hours worked in the week.
- (C) The ten pages hereto attached numbered 16 to 25, inclusive, give certain additional information with respect to the employment and payment of each of the ten plaintiffs whose summarized work records appear on pages 1-15, inclusive, namely, the exact hours of starting and stopping work on each day of the workweek ending April 2, 1944, and the detail of the calculation of pay for that week. The symbols and the rates of pay are explained above. The timekeeper's day runs from 8 A. M. to 8 A. M. Thus, under the heading "Monday", for example, the entries on these pages show the hours worked between 8 A. M. Monday and 8 A. M. Tuesday.
- (D) If and only if a plaintiff worked 40 hours between 8 A. M. and 12 Noon and 1 P. M. and 5 P. M. on Mondays

Plaintiffs' Exhibit 8.

to Fridays, inclusive, which were not holidays, and then worked between 8 A. M. and 12 Noon on the Saturday of that workweek, he was paid an additional sum, for the work actually performed during those Saturday morning hours. The additional hourly rate paid for work actually performed during those hours was 621/2¢ per hour. The additional amount paid for such work was designated by the company on its payroll records Wage and Hour Adjustment."

(E) The particular plaintiffs, the exact hours of whose starting and stopping of work each day of the workweek ending April 2, 1944 appear on pages 16 to 25 attached to this stipulation, were selected at random and the week of April 2, 1944 was selected at random. The fact that none of the selected plaintiffs in this particular week worked on the Sunday of that week has no particular significance. In other weeks from time to time Sunday was in fact worked not only by the selected plaintiffs but by other plaintiffs.

June 17, 1946 ' (Date)

1674

June 17, 1946 (Date)

GOLDWATER & FLYNN and MAX R. SIMON,

by MONBOR GOLDWATER, Attorneys for Plaintiffs.

JOHN F. X. McGongy, United States Attorney.

By MARVIN C. TAYLOR, Attorneys for Defendant.

Approved:

SIMON H. RIFKIND, V. S. D. J.

Records omitted.

One copy of attached records to be handed up pursuant to stipulation.)

Plaintiffs' Exhibit 18.

May 14, 1943 SOL:EG:SMT

Mr. Vernon Williams
Vice President
The Cleveland Stevedore Company
Dock 2, West 9th and Front Streets
Cleveland, Ohio

Dear Mr. Williams:

This is with reference to your request for an opinion as to whether the provisions of the two contracts between your firm and Local 1317 of the International Longshoremen's Association meet the requirements of the Fair Labor Standards Act. Copies of the amendments to these contracts have been forwarded to me by the regional office in Cleveland and they will be taken into consideration in this letter.

Both contracts provided that in the event of rain, employees shall not be paid for the first half hour of waiting time but shall be paid the regular rate of pay for all subsequent waiting time. This provision, in my opinion, fails to meet the requirements of the Act. Since the imminence of the resumption of work in this case requires the employee's presence at his place of employment, all time spent waiting for the rain to cease should be considered as waiting time under the Act, and the employees should receive compensation for time thus spent.

In both contracts submitted, it is provided that any work performed beyond the hours fixed for the regular workday or regular workweek shall be considered as "overtime work" and be compensated for at the rate of one and one-half times the regular rate per hour. The agreements further provide that in the computation of any overtime rate under the Fair Labor Standards Act.

1676

Plaintiffs' Exhibit 18.

the regular rate per hour prescribed in that agreement shall be deemed to be the regular rate of pay applicable to the particular employment. The regular workday is described as the hours between 6 a. m. and 6 p. m. daily and the regular workweek from 6 a. m. Monday to 6 p. m. Saturday, excluding any holiday which may fall within the week. As I understand the situation, the employees may be called upon to work any hour of the day of night.

As the vagaries of the stevedoring business may require an employee to work any hour of the day or night, it is my opinion that the hours after 6 p. m. daily are as much the employee's regular hours as the hours between 6 a. m. and 6 p. m. Consequently, the extra compensation paid for hours between 6 p. m. and 6 a. m. is not compensation paid for overtime but simply a higher rate of pay to the employee for working during inconvenient hours.

The Division has taken the position that where an employee during a week performs different types of work which call for different rates of pay, the employer may elect to compute overtime compensation either on the rate applicable for the work performed during the overtime hours or on the average hourly rate. If you should elect to pay overtime compensation on the average hourly rate, compensation paid for the hours between 6 p. m. and 6 a. m. must be averaged with compensation paid for the hours between 6 a. m. and 6 p. m. in order to determine the employee's regular rate of pay for purposes of the Act. It is my opinion, however, that overtime compensation paid for Sunday or holiday work under either system may be credited toward overtime due under the Act.

Crediting of payment for Sundays or holidays is permissible since it appears from your agreement that the compensation for such work is intended to be overtime compensation and it is my view that time worked on Sun-

1679

day or holidays can be regarded as time outside of the employee's normal working hours. However, your attention is directed to the fact that if the averaging system is used the amount that may be credited against the overtime due under the Act will be the actual difference between the regular rate computed by averaging total straight time compensation and the amount paid for holiday or Sunday work.

In all other respects, the provisions of the contract appear to meet the requirements of the Act.

Very truly yours,

1682

L. METCALFE WALLING
Administrator

Plaintiffs' Exhibit 19.

SOL:AGW:DWH August 17, 1945

Washington 25, D. C.
Mr. H. K. Swenerton
Wage & Solary Administrator
Consolidated Vultee Aircraft Corp.
San Diego, California

1683

Dear Mr. Swenerton:

This will reply to your letter inquiring whether the method of computing overtime compensation employed by Consolidated Vultee Aircraft Corporation meets the overtime requirements of the Fair Labor Standards Act.

You state that the company's first and second shifts are 8 hours a day and the third shift is 6½ hours a day. You state further that third-shift employees are paid 8 hours' pay at second-shift rates for 6½ hours of work. Work in excess of 6½ hours on the third shift or 8 hours on the

Plaintiffs' Exhibit 19.

second shift is paid for at time and one-half the established rate for the second shift. Similarly, work in excess of 8 hours on the first shift is compassed at the rate of time and one-half the established first-shift rate.

Your letter also sets out the following example of how an employee's hourly earnings vary as between the three shifts.

Shift	Working Hours	Per Hour
1685 2	8	\$1.00 \$1.00
3	6½	\$1.00 plus \$.08 = \$1.08 8x (1.00 plus \$.08) + 6.5 = \$1.33

You state that it is your view that \$1.33 is the proper rate to use in computing overtime compensation of the third-shift employees under the Fair Labor Standards Act and that amounts paid in excess of this sum to such employees for work in excess of 6½ hours may be credited against overtime due under the Fair Labor Standards Act for work performed in excess of 40 hours a week whether they work only occasionally or whether they work regularly in excess of 6½ hours a day.

Paragraph 69 of Interpretative Bulletin No. 4, a copy of which is enclosed, states:

"Extra compensation paid for overtime work, even if required to be paid by a union agreement or other agreement between the employer and his employees need not be included in determining the employee's regular hourly rate of pay (see par. 13 of this bulletin). Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as

compensation for overtime work-that is, for hours worked outside the normal or regular working hoursregardless of whether he is required to pay such compensation by a union or other agreement. In no week, of course, will the evertime requirements of section 7 be met unless the employee receives an amount equal to at least his regular rate of pay for 40 hours and time and one-half such rate for the hours worked inexcess of 40."

It should be noted that this quotation stresses the point that daily overtime compensation must be paid for work in addition to the employees' regular schedule, if it is to be credited against overtime required by the Fair Labor Standards Act. In this connection, see also subparagraphs (3) and (4) of paragraph 70 of the bulletin.

In Walling v Helmerich & Payne, 323 U. S. 37, the Supreme Court in discussing the question of daily overtime

compensation said (on pages 40, 41):

"The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by section 7 (a). While the words 'regular rate' are not defined in the act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. Overnight Motor Co. v. Missel, supra.

1689

"But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate

Flaintiffs' Exhibit 19.

was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated 'overtime' and called for compensation at a rate one and one-half times the fictitious regular rate.

* * Hence he was entitled to no additional remuneration for work in excess of 40 hours except in the unlikely situation; which never in fact occurred, of his actually working more than 80 hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, nonovertime hours, nor did it allow extra compensation to be paid for true overtime hours.

* * ""

1691

I am unable to agree with your view that an employee who regularly works 8 hours a day (or some other number in excess of 6½) receives overtime compensation which is creditable against overtime due under the Fair Labor Standards Act, if he is paid extra compensation for the work in excess of 6½ hours which he regularly performs merely because he reports to work at the same time as employees who either never or only occasionally work in excess of 6½ hours a day. In other works, the question of whether particular compensation is for hours in excess of the regular or normal hours of work or is the normal non-overtime workweek should be answered on the basis of the individual employee's hours of work rather than those of the shift to which he is deemed to be attached.

1692

To determine the fegular rate of pay at which an employee is employed in a situation such as you present, all compensation, except true overtime compensation received by the employee, should be divided by the number of non-overtime hours worked. Extra compensation for work in excess of 6½ hours a day may be considered as overtime compensation due under the Fair Labor Standards Act only if it is paid as overtime compensation and is

paid for hours in excess of those normally and regularly worked by that employee. Thus, where an employee is employed on the third shift and regularly works only 61/2 hours for which he receives the same pay as if he had worked 8 hours on the second shift, his regular hourly rate of pay is 1/6.5 x 8 x the stated hourly rate of the second shift. However, if an employee regularly works a longer hours his regularly hourly rate of pay must be computed by adding together all compensation received for all his non-overtime hours and dividing the resulting sum by the number of hours for which it is compensation. Accordingly, the compensation of an employee employed on the third shift, who is paid in the manner described in the second paragraph of this letter, would be computed as follows, if he regularly works 8 hours, the second-shift rate is \$1.08 and he works six 8-hour days in a particular

week:

No. of non-overtime hours for the week
during the first 6½ hours a day ... = 32.5

No. of non-overtime hours for the week
after the first 6½ hours a day ... = 7.5

Total non-overtime hours for the week = 40.

Overtime hours for the week ... = 8

Total hours worked in the week ... = 48

Pay for hours in excess of 6½ a day ... = 1½ x 1.08

Straight-time compensation
40 hours (for 32.5 hours' work) x
\$1.08 ... = \$43.20

11.25 hours (1½ x 7.5 hours' work) x
\$1.08 ... = \$43.20

Total Straight-time compensation for 40
hours ... = \$55.35

Regular rate of pay per hour—\$55.35 \(\div \)

40 \(\text{...} = 1.38 \)

Straight-time and overtime compensation for 8 hours—\$1.38 \(\text{x} 1 \frac{1}{2} \) \(\text{x} 8 \) hours = 16.56

Straight-time compensation for 40 hours = 55.35

Total straight-time and overtime compensation for the week \(\text{...} = \$71.91 \)

Very truly yours,

. . .

Enslosure

Wm. R. McComb Deputy Administrator

Defendants' Exhibit A.

1699

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-212.

Civil Action No. 33-213.

LEO BLUE, et al.,

Plaintiffs, 1700

v.

HURON STEVEDORING CORP.,

Defendant.

JAMES AARON, et al.,

Plaintiffs,

BAY RIDGE OPERATING CO., INC.,

Defendant.

1701

STIPULATION RELATING TO THE NEW, YORK COLLECTIVE
BARGAINING AGREEMENTS.

It is hereby stipulated by the parties, through their undersigned attorneys of record, subject to paragraph (4) below and subject to the approval of this Court:

(1) That the 30 agreements hereto attached, and the three awards made in connection with three of the contracts, are correct copies of all the collective bargaining agreements for the Port of Greater New York covering

Defendants' Exhibit A.

the period from May 3, 1916 to date, between the International Longshoremen's Association, and the signatory members of the New York Shipping Association, the Deepwater Steamship Lines, and Contracting Stevedores of the Port of Greater New York and vicinity.

- (2) That the signatory parties, other than the International Longshoremen's Association, included all members of the New York Shipping Association, and of the Deepwater Steamship Lines, and of the Contracting Stevedores of the Port of Greater New York.
- (3) That all plaintiffs during the period covered by this suit were members in good standing of the International Longshoremen's Association.
- (4) The plaintiffs reserve all rights to object to the admissibility and materiality of any of the contracts or awards, or facts covered by this stipulation.

June 17, 1946 (Date) GOLDWATER & FLYNN and MAX R. SIMON,

1704.

Attorneys for Plaintiffs.

June 17, 1946. (Date) JOHN F. X. McGoney, United States Attorney.

By Marvin C. Taylor, Attorneys for Defendant.

Approved:

Simon H. Rifkind, U. S. D. J.

Agreements omitted.

(One copy of attached agreements to be handed up pursuant to stipulation.)

Defendants' Exhibit B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action-File No. 33-212.

LEO BLUE, et al.,

Plaintiffs,

against

HUBON STEVEDORING CORP.,

1706

Defendant.

STIPULATION RELATIVE TO EXHIBIT 7, PARAGRAPH A.

The following facts are stipulated to be true:

(1) Where rates of pay appear on the lines marked "A" in Exhibit 7 they are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "straight time" rates of pay for longshoremen in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945 for comparable positions and types of cargo handled. When no rates of pay are entered on the lines marked "A" and the rates of pay are as stated in paragraph "B (4)" of Exhibit 7, such rates are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "straight time" rates of pay for longshoremen handling general cargo in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945. The agreement provides that "straight time rate shall be paid for any work performed between 8 a. m. and 12 noon and. from 1 p. m. to 5 p. m. Monday to Friday, inclusive, and from 8 a. m. to 12 noon Saturday."

Defendants' Exhibit B.

- (2) Where rates of pay appear on the lines marked "B" in Exhibit 7 they are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "overtime" rates of pay for longshoremen in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945 for comparable positions and types of cargo handled. When no rates of pay are entered on the lines marked "B" and the rates of pay are as stated in paragraph "B (4)" of Exhibit 7 such rates are, except as to Headers and Assistant Foremen, the 1709 same as the rates enumerated as "overtime" rates of pay for longshoremen handling general cargo in the Collective Bargaining Agreement for the Port of Greater New York for the years 1943-1945. The agreement provides that (immediately after the language quoted in the preceding paragraph) "all other time, including meal hours and legal holidays specified herein, shall be considered overtime, and shall be paid for at the overtime rate."
- (3) The Collective Bargaining Agreement does not specifically provide rates of pay for Headers and Assistant Foremen. By long established custom in the port, longshoremen, when temporarily so assigned, are paid 5¢ 1710 and 15¢ per hour, respectively, more than they would receive if working as longshoremen; By similar custom longshoremen working as painters are paid the same rates as longshoremen working on general cargo. Travel time, by custom, is an hour's pay, at the longshoremen general cargo rate, to certain nearby places; and two hours' pay at the longshoremen general cargo rate to more distant points.
 - (4) It is specifically understood that the plaintiffs reserve the right to object to the admissibility of the facts set out above on the ground that they are incompetent,

that by stipulating as above the plaintiffs have not conceded or admitted that the Collective Bargaining Agreement constituted the contract of their employment or in any way determined the rates which they were entitled to receive.

Dated, New York, N. Y., June 17th, 1946.

GOLDWATER & FLYNN and Max R. Simon,

by MONROE GOLDWATER, Attorneys for Plaintiffs.

JOHN F. X. McGohey, United States Attorney.

By Marvin C. Taylor, Attorneys for Defendant.

Defendants' Exhibit C.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 33-213.

JAMES AABON, et al.,

Plaintiffs,

1715

BAY RIDGE OPERATING Co., INC.,

Defendant.

STIPULATION BELATIVE TO EXHIBIT 8

- A. The following facts are stipulated to be true.
- (1) The rates of pay appearing in the column in Exhibit 8 captioned "Hourly Rate-A" are, except as to Headers and Assistant Foremen the same as the rates enumerated as "straight time" rates of pay for longshoreman in the collective bargaining agreement for the Port of Greater New York for the year 1944 for comparable positions and types of cargo handled. The agreement provides that, "straight time rate shall be paid for any work performed from 8 a. m. to 12 noon, and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 noon Saturday."
- (2) The rates of pay appearing in the column in Exhibit 8 captioned "Hourly Rate-B" are, except as to Headers and Assistant Foremen, the same as the rates enumerated as "overtime rates" of pay for longshoremen in the collective bargaining agreement for the Port of Greater New York for the year 1944 for comparable positions and types of cargo handled. The agreement provides (immediately

after the language quoted in the preceding paragraph), "All other time, including meal hours and the legal holidays specified herein, shall be considered overtime, and shall be paid for at the overtime rate."

(3) The collective bargaining agreement does not specifically provide rates of pay for Headers and Assistant Foremen. By long established custom in the port, long-shoremen, when temporarily so assigned, are paid 5¢ and 15¢ per hour, respectively, more than they would receive if working as longshoremen. By similar custom long-shoremen working as painters are paid the same rates as longshoremen working on general cargo. Travel time, by custom, is an hour's pay, at the longshoremen general cargo rate, to certain nearby places; and two hours' pay at the longshoremen general cargo rate to more distant points.

B. It is specifically understood that the plaintiffs reserve the right to object to the admissibility of the facts set out in paragraph A above on the ground that they are incompetent, irrelevant and immaterial; and it is further understood that by stipulating as in paragraph A above the plaintiffs have not conceded or admitted that the collective bargaining agreement constituted the contract of their employment or in any way determined the rates which they were entitled to receive.

June 17, 1946 (Date) GCLDWATER & FLYNN and MAX R. SIMON,

by MONBOE GOLDWATER, Attorneys for Plaintiffs.

June 17, 1946 (Date)

JOHN F. X. McGoney, United States Attorney.

By MARVIN C. TAYLOR, Attorneys for Defendant.

Defendants' Exhibit N.

COPY

December 1, 1938

Miss Dorothy Williams
Pacific Coast Regional Counsel
Wages and Hours Division
U. S. Department of Labor
785 Market Street, Room 902
San Francisco, California

Dear Miss Williams:

A number of basic industries are vitally concerned with the proper interpretation of certain provisions of the Fair Labor Standards Act of 1938.

The Act provides (Sec. 7(a)) that, subject to exceptions, employees subject to the Act shall not be employed for a work week longer than 44 hours unless such employee receives compensation for, his employment in excess of 44 hours at a rate of not less than one and one-half times the regular rate at which he is employed.

Many collective bargaining agreements and company practices fix a straight time and also an overtime rate of pay at one and one-half the straight time rate, the former being applicable during specified hours of the day, the latter after the expiration of a maximum number of hours specified or at certain times such as at night or on Sundays or holidays.

It seems plain that an employer, who compensates his employees for certain hours of work during the week at an overtime rate of not less than one and one-half times the prevailing straight time rate, is entitled under the Act to a full 44 hours of work at the prevailing straight time rate of pay exclusive of hours paid for at the overtime rate, and that statutory compensation at the time and one-half rate only applies after 44 hours of work paid

for at the straight time rate prevailing under labor contracts or company practices.

It would seem equally plain, in computing compensation under the Act for employment in excess of 44 hours during the work week, that the regular rate referred to in the Act is that rate which is paid for straight time hours of work prescribed in labor agreements or applied under company practices, and that therefore the statutory compensation prescribed is one and one-half times such straight time rate. In other words, when the overtime rate prevailing is one and one-half times the straight time rate, the term "regular rate" as used in the Act is the straight time rate and not the overtime rate.

1724

Because of the extreme importance of these questions to the industries concerned, it is requested that you advise in writing whether the views expressed above are correct.

Yours very truly,

(Signed) ALBERT E. BOYNTON, President INDUSTRIAL ASSOCIATION OF SAN FRANCISCO

Defendants' Exhibit N.

COPY

December 6, 1938

Industrial Association of San Francisco Alexander Building San Francisco, California

Attention-Mr. A. E. Boynton

Gentlemen:

1727

This is in reply to your letter of December 1, 1938.

In situations such as the one outlined in your, letter, where collective bargaining agreements or company practices have established a straight time hourly rate of pay and also an overtime hourly rate at one and one-half times the straight time rate, the straight time rate is the "regular" rate, within the meaning of section 7 (a) of the Tair Labor Standards Act.

I do not think it is correct to say that the employer is entitled under the Act to a full 44 hours of work at the prevailing straight time rate of pay. The Act confers not a right, but an obligation, upon the employer. It requires him to compensate each of his employees for employment in excess of 44 hours in a workweek at a rate not less than one and one-half times the regular hourly rate of pay. The right of the employer to any specified numbers of hours of work not exceeding 44, at the straight time rate, might, in the case supposed, be governed by his contract with the union.

If the employer, in the case supposed, compensates his employees for all hours of employment in excess of 44 in a workweek at a rate not less than one and one-half times the straight rate, he has met the requirements of section 7 of the Act; and it is of no consequence that the overtime

payment is allocated to particular hours, under the terms of his agreement with the union.

If this letter does not fully answer your question, please let us know.

Very truly yours,

WESLEY O. ASH Reginal Director

By (Signed) DOROTHY M. WILLIAMS Regional Attorney

1730

Defendants' Exhibit O.

SOL:AGW:HD

Washington 25, D. C.

December 21, 1945

Mr. Claude W. Brown, Vice President Marine Clerks Association Local 63 2021 Daisy Avenue Long Beach 6, California

1731

Dear Mr. Brown:

This will reply to your letter of November 7, 1945, in which you request an opinion on three problems which you present.

1. You state that in the week of October 15, 1945, you worked the hours shown in the following schedule and were paid the amounts shown in it. You ask whether your overtime compensation was correctly computed for the week in question.

Defendants' Exhibit O.

Day Wo	rke	d Rate	Straight Time pay Overtime Premium pay
Monday	9	\$1.30	$9 \times \$1.30 = \$11.70 \frac{1}{2} \times \$1.30 \times 1 = \$.65 \$$
Tuesday	10	\$1.30	$10 \times 1.30 = 13.00 \% \times 1.30 \times 2 = 1.30$
Wednesday	9	\$1.30	$9 \times 1.30 = 11.70 \frac{1}{2} \times 1.30 \times 1 = .65$
Thursday	8	1.20	$8 \times 1.20 = 9.60$
Friday	8	1.20	$8 \times 1.20 = 9.60$
Saturday	8	1.20	$8 \times 1.20 = 9.60 \frac{1}{2} \times 1.20 \times 8 = 4.80$

You state that the work performed on Thursday through Saturday was different from that performed Monday through Wednesday. It is your belief that your employer should have computed your regular rate of pay for overtime compensation by dividing the number of hours you worked in the week into the compensation for the week.

Computation would be as follows:

	$=$ \$65.20 \div 52 hours $=$ $=$ $\frac{1}{2}$ x \$1.25 x 12 hours $=$.	
Straight time compensa-		65.20

Total compensation .. =

\$72.70

There are enclosed copies of releases R-1913 and R-1913 (A) in which the Administrator announced a change in the administrative policy respecting the computation of overtime compensation. Under these releases the method of computation set out in paragraph 14 of Interpretative Bulletin No. 4 to which you refer is still accepted for administrative purposes as compliance with the Fair Labor Standards Act. However, in the case of hourly paid workers performing different types of work calling for different rates of pay, the Administrator also accepts for administrative purposes, as compliance with the overtime

provision of the Act, the payment of one and one-half times the rate applicable to the overtime hours, if the employer has shown an election to pay on that basis.

Under the Fair Labor Standards Act the overtime hours are the hours worked after the fortieth hour of work in the week. In the situation which you present, assuming that the employer has elected to pay overtime compensation on the rate applicable to the overtime hours, the Administrator would require only that the employee be paid \$7.20 as overtime compensation for a total compensation of \$72.40 for the week (the last 12 hours worked are the overtime hours, $\frac{1}{2}$ x \$1.20 x 12 = \$7.20). Assuming that the premium payments which you designate as overtime compensation are true overtime compensation, they may be credited against overtime compensation due under the Fair Labor Standards Act, and the employer has more than satisfied his obligations under the Act. Paragraphs 69 and 70 of Interpretative Bulletin No. 4 discuss the types of premium payments which may be credited against overtime compensation due under the Act.

2. You ask:

"Suppose I work from a Monday through Friday eight hours per day for one of the member companies and then on Saturday I am dispatched to someone of the other member companies for work and work eight hours on Saturday, making a total of forty-eight hours worked, (this happens often). Am I entitled to overtime pay for the eight hours worked on Saturday?"

Whether you are entitled to overtime pay in this situation would depend upon whether the two employers may be considered to be acting entirely independently of each other with respect to your particular employment. If they are acting independently each employer, in ascer1736

1740

Defendants' Exhibit O.

taining the extent of his obligations under the Act, may disregard any work you performed for the other. Consequently, if this situation exists in the instance you mention, the Act would not require either employer to pay overtime compensation in the instance you present. On the other hand, if your employment by one employer is not completely disassociated from your employment by the other, the total of the hours worked for the two employers should be considered as a whole for the purposes of the Act. Whether employments by two employers are completely disassociated depends, of course, upon the facts in the particular case. However, a joint employment will not be considered to exist solely because a single collective bargaining agreement covers both employers.

3. You also ask:

"Suppose I work over forty hours nights from 5 p. m. to 8 a. m. when our overtime rates apply, see page 9, sec. 1. Am I entitled to time and one-half of the \$1.80 rate applicable to night work, if I work over forty hours in a week?"

In view of the fact that this precise question is being raised in several pending suits involving longshoremen employees and Government contractors, the Division deems it inadvisable to answer this question at this time.

If you have additional questions regarding the Fair Labor Standards Act, I shall be glad to advise you further. You may, however, find it more convenient to consult the branch office of the Wage and Hour and Public Contracts Division at 417 H. W. Hellman Building, Spring and Fourth Streets, Los Angeles 13, California.

Very truly yours,

WM. R. McComb Deputy Administrator

Enclosures

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LEO BLUE, et al.,

against

HURON STEVEDORING CORP.,

Defendant.

Plaintiffs.

Plaintiffs.

JAMES AARON, et al.,

against

BAY RIDGE OPERATING Co., INC.,

Defendant.

Ciy. 33-212

Civ. 33-213

1742

APPEARANCES:

Max R. Simon, Esq., and Goldwater & Flynn, Esqs., Attorneys for Plaintiffs; Monroe Goldwater, Esq., James L. Goldwater, Esq., Joseph E. O'Grady, Esq., of Counsel.

John F. Sonnerr, Esq., Assistant Attorney General; John F. X. McGohey, Esq., United States Attorney, Attorneys for Defendant.

J. Francis Hayden, Esq., Spec. Assistant to the Attorney General.

Marvin C. Taylor, Esq., Attorney, Department of Justice.

MARY L. SCHLEIFER, Esq., Labor Law Counsel, War Shipping Admin. of Counsel.

Opinion.

The Fair Labor Standards Act provides:

"7(a) No employer shall " " employ any of his employees " " for a work week longer than 40 hours " unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (29 U. S. C. A. 207).

The collective bargaining agreement between the International Lonshoremen's Association and the defendants, which governs the employment practices of the plaintiffs and the defendants herein, provided for two classes of compensation: a "straight time" hourly rate and an "overtime" hourly rate. Paragraph 3 of the agreement, in effect during the period involved in this litigation, provided as follows:

"(a) Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M., Monday to Friday inclusive, and from 8 A. M. to 12 Noon Saturday. (b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate."

For general cargo, the straight time hourly rate was \$1.25 and the overtime hourly rate was \$1.875.

It is the plaintiffs' contention that the excess of the "overtime" rate over the "straight time" rate represented a shift differential; that \$1.875 per hour constituted the regular rate for the night shift; that when more than 40 hours of work was done in any one week and all such work was performed during the night shift, the overtime rate must be calculated at 150% of \$1.875 and such rate applied to the hours in excess of 40; that in all cases the

compensation should be calculated in one of two ways, the first of which plaintiffs prefer. 1. Total wages paid divided by total hours worked equals regular rate to be applied to 40 hours; and 150% thereof to the hours in excess of 40. 2. Wages payable at contract rates for the first 40 hours of work, divided by 40, equals the regular rate; 150% thereof is the rate to be applied to the hours in excess of 40.

There is a certain plausibility about plaintiffs' case. For instance, in the case of an employee who worked only during the so-called "overtime" hours, it is true that he received compensation at no greater rate for the hours in excess of 40 than for the hours within 40. Such a result seems to fly in the face of the statute.

The defendants' contention is on its face equally plausible. They declare that the "regular rate", which is the statute's measuring rod, has been contractually established by the parties at \$1.25 an hour; that for all hours in excess of 40, defendants have, in accordance with the statutory command, paid \$1.875 an hour; and that in addition, beyond the command of the statute, they have paid \$1.875 an hour for all hours outside of a specified clock-pattern. Having paid more than required by statute, they contend, they have not violated its provisions.

The I. L. A. is not a party to the litigation. However, Mr. Joseph B. Ryan, its president, testified as a witness for the defendants. He reported that 30,000 members were employed at the Port of New York during the war; that the Union objectives were "to decasualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday"; that there has been no strike of longshoremen from 1907 to 1945; and that the Union was opposed to the suit "as it might wipe out all of the gains we had made for our men over a period of 25 years".

1748

Opinion.

This controversy requires for its resolution a delicate adjustment to accommodate the harmonious application of three national policies. A heavy handed meshing of these three policies with the industrial machine which fails to minimize the friction at their points of contact can generate enough heat to impair one or more of the policies or severely injure the machine itself.

In chronological order we have (1) the National Labor Relations Act, July 5, 1935, 49 Stat. 499, to encourage the practice of collective bargaining; (2) the Fair Labor 1751 6 Standards Act, June 25, 1938, 52 Stat. 1060, to correct and eliminate the labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers; (3) the national need during the war for the maximum of production as illustrated by Executive Order 9301, February 9, 1943, 8 Fed. Reg. 1825, establishing the 48 hour week for the duration of the war.

A few simple illustrations make this necessity clear.

1. A number of industries have, by collective bargaining, established a workweek of less than 40 hours, 36 or 30-although actual work is pursued during 48 hours or longer. In such industries the employees receive "straight time" compensation for the stipulated hours and "time and a half" for all hours in excess thereof. Manifestly they do not receive, for hours in excess of 40, 150% of the average rate paid for the hours within 40. I see nothing in the policy and purposes of F. L. S. A. which forecloses bona fide negotiation between employers and a union for a shorter work week than 40 hours a week. (1)

¹ Presumably a labor contract which established a one-hour week with provision for compensation for "time and a half" for all hours. in excess of one hour would fail, as a device to circumvent F.L.S.A.

- 2. A number of industries have developed collectively bargained agreements which have established a work week measured not only by a specified number of hours per week but by a specified number of hours per dayusually, eight hours. Compensation for hours of work in excess of the prescribed daily schedule of eight hours is calculated at 150% of the established rate even if the aggregate of hours for the week does not exceed 40. Assuming a work schedule of five 10-hour days, the employees would receive, under their contract, compensation at overtime rates for 8 hours of the first forty. The rate of pay for hours in excess of forty would be less than 150% of the average rate for the hours within forty. Manifestly the application to such an employment arrangement of either of the formulae suggested by plaintiffs would constitute a deterrent to the negotiation of such employment contracts.
- Following the promulgation of Executive Order No. 9301, and in many instances before that date, in response to the war-time demand for production, the 48 hour work week became quite general. In the case of newly recruited employees in the war industries, 48 hours measured the "normal" work week throughout the term of their employment. In a sense, the 40 hour week was merely a theoretical fiction as opposed to the "real" fact of a 48 hour week. The logical extension of plaintiffs' argument would require a holding that in paying such employees for the 8 hours of overtime at a rate equal to 150% of the straight time rate, such employers had violated the F. L. S. A.; that the wages payable to such employees must now be recalculated by finding the "regular rate" to consist of the quotient of total weekly wages, divided by 48, and the overtime rate as equal to 150% thereof. Would employers, even in the exigencies of the

Opinion.

war, have so readily yielded to the demands of national policy for a longer work week if they could foresee such an enlarged wage liability?

Whatever the answer to such a rheterical question, it is clear that the application of either of plaintiffs' formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry.

1757

Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the "regular rate" intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live.

If we are free to reject the contractual "regular rate" in the case of longshoremen, there is no rational basis for not rejecting it in the three illustrations. The inevitable consequence of such a rule would be severely to restrict the scope of collective bargaining, to check the development of agreements more favorable to employees than the minimum standards established by F. L. S. A. and to retard the use of overtime even when national interest required it.

1758

Such a dilemma is not a necessary implication of the F. L. S. A. That Act can more easily be read to be in harmony with the N. L. R. A. and a flexible work pattern. The F. L. S. A. does not speak of an average rate; it speaks of a regular rate. Congress has not circumscribed the courts in the selection of a "regular" rate.

The Supreme Court has already given the cue. Collective bargaining agreements, though favored by the law, will not be permitted to do open violence to the policies of the Fair Labor Standards Act.

Walling v. Harnischfeger Corp., 1945, 325 U.S. 427.

The converse is likewise true. T. L. S. A. should not lightly override the policy of collective bargaining. F. L. S. A. establishes minimum standards. Collective bargaining has freedom to move unhampered above the floor F. L. S. A. establishes.

In Walling v. Belo Corp., 1942, 316 U. S. 624, 631, the court said,

"In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term 'regular rate.' But,
it is agreed that as a matter of law employer and
employee may establish the 'regular rate' by contract."

The dissenting justices did not challenge this proposition. They said, p. 636,

"The Court's interpretation that, in the absence of bad faith, any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be corgect."

1761

They differed only in their construction of the contract as providing for weekly wages with variable hours.

Analysis of the instant contract reveals a rather unique situation. We are not here concerned with a condition like that confronting the Supreme Court in Walling v. Helmerich & Payne, Inc., 1944, 323 U. S. 37. There a scheme was devised by a mathematical arrangement, unrelated to the facts, to defeat the purposes of F. L. S. A. Here we are dealing with a collectively bargained agreement which is the natural development of a long history.

Nor is the problem of this case that which the Supreme Court dealt with in Walling v. Harnischfeger Corp., supra, where regular incentive bonuses were unlawfully excluded from the regular rate of compensation.

In both of these cases, and arguably in the Belo case, there was a normal work week, and a regular rate of compensation which was capriciously or at least designedly distorted in order to exhibit a mechanical compliance with F. L. S. A. The identifying mark of the case at bar is the absence of any norm, any regularity. Both parties have emphasized the casual, irregular character of the employment. Once you cut loose from the anchor of the agreement, neither employee nor employer would have any means of calculating what rate of compensation has been earned until sometime after the event. Employees working side by side would be earning different rates of compensation. An employee's compensation would vary depending upon whether he worked for one employer or for more than one, in the course of a single week. none of these considerations is of paramount significance, it cannot be said by a court that they are beyond proper evaluation by a labor union seeking to maintain orderly and peaceful labor relations in a highly casual field of employment. Decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation are legitimate objectives of a collective labor agreement. None of them is artificially designed to defy the spirit of the F. L. S. A. while embracing its letter. The agreement here under scrutiny was not an artificial rearrangement of pre-F. L. S. A. rates of compensation in order to avoid additional compensation payable under that Act. It is not an attempt f'to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes":

Walling v. Helmerich & Payne, Inc., supra;

1763

Walling v. Youngerman-Reynolds Hardwood Co., 1945, 325 U.S. 419, 424.

On the contrary it is the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation.

Plaintiffs argue that the command of the statute is not satisfied unless at a chronological point, 40 hours after the commencement of work, a rate of 150% of the rate of compensation during the first 40 hours goes into effect. The statute clearly does not speak of premium payments for hours following the first forty, but only for hours in excess of forty. The only support for plaintiff's contention is the language of the court in Walling y. Youngerman-Reynolds Hardwood Co., supra, 423,

"Thus by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, §7(a) achieves its dual purpose * * *."

Clearly the court's attention was not addressed to the subtlety which plaintiffs now suggest. Until the Appellate Courts command otherwise I shall not assume that an employment contract which puts the premium rate 1767 into effect for all hours in excess of 36, violates the statutory mandate, although no change in rate is effected at the end of 40 hours.

A contract cannot arbitrarily convert a shift differential into an overtime premium. But neither should the circumstance that war time exigencies vastly multiplied the occasions for overtime work convert true overtime premiums into shift differentials.1

Of the 20 plaintiffs, only 4 did all their work during contract "overtime" hours; two worked only a very small number of "straight time" hours; four worked more "straight time" hours than "overtime" hours.

Opinion.

Confessedly the line of distinction between the two may at times be difficult to discern. One of the economists identified the ratio of the premium as the only reliable guide. Shift differentials are usually represented by very modest premiums—5¢-15¢, per hour. The economics of the shift differential are that the more intensive use of plant and equipment permits the employer to pay a somewhat higher wage without incurring costs higher than in one shift operation and perhaps even to obtain lower costs. The shift differential is not designed to deter plural shift operation. The 50% overtime premium, as provided by statute and by the labor agreement here, is expressly designed to deter the penalized activity.

On the evidence adduced here it cannot be doubted that the "overtime" premiums established by I. L. A. agreement were designed to curtail, and measurably succeeded in curtailing, excessive and abnormal hours. Even during the peak of the Battle of the Atlantic there was a far greater concentration of work during the regular 44 hour period than during "overtime" hours. The fact that throughout the war stevedores were required to obtain special permission from the War Shipping Administration before they could put longshoremen to work after 5 P. M. throws light upon the deterrent purpose and effect of the penalty payment.

1770

² Economic Stabilization Director issued a policy directive, dated March 8, 1945, which placed a definite limitation on the amount of shift differentials which the National War Labor Board might approve or direct for non-continuous shift operations. Under this limitation, the differentials could not exceed four cents for the second shift and eight cents for the third shift. This was supplemented by a directive of April 24, 1945, which permitted the N.W.L.B. to approve or direct shift differentials for continuous shift operations in amounts not to exceed four continuous shift and six cents for the third shift. (C.C.H. Labor Law Service, Vol. 1 A, parags. 10,034.11 and 10,462.)

In the instant case, the collectively bargained agreement established a regular rate. True in a few instances the employee never received the regular rate because all of his work fell into the "overtime" period. That is a fortuitous circumstance which does not detract from the regularity of the rate.

I conclude that defendants have not violated the

F. L. S. A. except in the following instances:

1. Where a defendant failed to pay a plaintiff who was employed as a header, gangwayman or assistant foreman, receiving therefor additional compensation at the regular rates of 5¢, 5¢ and 15¢ per hour, respectively, one and one-half times such regular rates for hours in excess of 40 during any work week.

1772

2. Where a defendant failed to pay a plaintiff who was employed as a longshoreman handling the specific types of cargo enumerated in paragraphs 4(b)-(e), inclusive, of the collective agreement, one and one-half times the "straight time hourly rates" set forth in the collective agreement for such types of work for hours worked in excess of 40 during any work week.

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3. Where defendant Bay Ridge Operating Co., Inc., failed to pay plaintiffs Alston, Roper and Tolbert at a rate of one and one-half times the "straight time hourly rate" at which said plaintiffs were employed, for hours worked in excess of 40 during any work week, all during "straight time" hours.

With respect to these specific items additional proof will be received and supplemental findings made.

Dated, New York, N. Y., Jan. 6, 1947.

Simon H. Rifkind, V.S.D. J.

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

These actions having been tried together to the Court without a jury, the court hereby makes its findings of fact and states its conclusions of law, as follows:

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FINDINGS OF FACT.

1. These actions were originally commenced as representative or class actions, brought on behalf of the plaintiffs named therein and "all employees and former employees of defendant similarly situated."

At the commencement of the trial, the parties stipulated that these actions are no longer to be considered as such representative or class actions, but as actions on behalf of the plaintiffs named therein.

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2. At the commencement of the trial the parties stipulated, in the action brought against Huron Stevedoring Corporation, that the actions of the following named plaintiffs:

Leo Blue;
Nathaniel Dixón;
Christan Elliott;
Tony Fleetwood;
James Fuller;
Joseph J. Johnson;
Sherman McGee;
Joseph Short;
Alonzo Steele;
Whitfield Toppin,

be severed, for the purpose of immediate trial, from the actions of the other plaintiffs named in the complaint, and that the legal rules and principles established by the final disposition of the severed actions shall apply in the actions of the remaining plaintiffs named in the complaint.

3. At the commencement of the trial the parties stipulated, in the action brought against the Bay Ridge Operating Co., Inc., that the actions of the following named plaintiffs:

James Aaron;
Albert Alston;
James Brooks;
Louis Carrington;
James Hendrix;
Austin Johnson;
Albert Green;
Carl Roper;
Mars Stephens;
Nathaniel Tolbert,

be severed, for the purpose of immediate trial, from the actions of the other plaintiffs named in the complaint, and that the legal rules and principles established by the final disposition of the severed actions shall apply in the actions of the remaining plaintiffs named in the complaint.

4. These actions, which have been consolidated for trial, cover employment of ten longshoremen employed by defendant Huron Stevedoring Corp., and of ten longshoremen employed by defendant Bay Ridge Operating Co., respectively, in the loading and unloading of ships in the Port of New York during the period October 1, 1943 to September 30, 1945 (hereinafter referred to as "the period in suit").

1778

Findings of Fact and Conclusions of Law.

- 5. Defendants were engaged, during the period in suit, in the general stevedoring business in the Port of New York in connection with which they made their contracts with shipowners and operators to load and discharge, at piers and docks cargoes moving in interstate or foreign commerce, by the use of longshoremen employed by defendants.
- 6. During the period in suit, the plaintiffs enumerated in Finding No. 2 were employed by defendant Huron Stevedoring Corp., and the plaintiffs enumerated in Finding No. 3 were employed by Bay Ridge Operating Co., Inc., as longshoremen at piers and docks within the Port of New York in loading and discharging cargoes in and off vessels moving in interstate and foreign commerce.
 - 7. The parties have stipulated that during the period in suit, plaintiffs were employees of the defendants respectively, engaged as longshoremen in commerce within the meaning or, and entitled to the benefits of, the Fair Labor Standards Act of 1938.
- 8. During the period in suit, there was in effect a col1782 lectively bargained agreement entered into between members of the New York Shipping Association and others,
 including defendants, and the International Longshoremen's Association, of which plaintiffs were members, covering all longshoring in the Port of New York.
 - 9. The Agreement contains the following provisions with respect to the hours of work and scale of wages:
 - "2(a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when re-

quired. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

- "(b) Meal hours shall be from 6 a. m. to 7 a. m., from 12 Noon to 1 p. m., from 6 p. m. to 7 p. m., and from 12 Midnight to 1 a. m.
- "(c) Legal Holidays shall be: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday on the New Jersey Shore, Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving, Christmas, and such other National or State Holidays as may be proclaimed by Executive authority.
- "3(a) Straight time rate shall be paid for any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday.
- "(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.
- "(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the men are relieved.
 - "4. Wage Scale: The wage scale shall be as follows:

Straight Over-GENERAL CARGO AGREEMENT Time time

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1786	0	Findings of Fact and Conclusions	of Law	
			Hourly Rate	Hourly Rate
	"(b)	Bulk Cargo, ballast, and all coal cargoes, including loading and trimming coal for a ship's own bunker purposes)	'\$1.92½
	"(c)	Cement in bags	1.30	$$1.92\frac{1}{2}$
1787	"(d)	Wet hides, creosoted poles, creosoted ties, creosoted shingles and soda ash in bags		\$2.021/2
1101	"(e)	Refrigerator space cargo—meats, fowls and other similar cargo—which is to be transported with the	mbas	
		temperature in the refrigerator at freezing or lower; these rates shall be paid the full gang	1.	\$2.071/2
	"(f)	Kerosene, gasoline and naphtha in cases and barrels, when loaded by case oil gangs, and with a fly		\$2.171/2
1.7	"(g)	Explosives	\$2.50	\$3.75
1788	6	(i) When handled down the Bay, the time shall start from the time men leave the pier until		1
		the time they return to pier. (ii) When handled down the Bay, men shall supply their own meals, but \$1.00 per meal shall be allowed by the employer.		
		(iii) When explosives, such as are customarily handled down the Bay are handled at any pier, men shall be paid at the Ex-		
		plosives rate of pay.		

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Hourly Hourly Rate Rate

- (iv) Any dispute as to what explosives are, shall be settled by the Bureau of Explosives whose decision shall be final and shall be accepted by both sides.
- "(h) Damaged Cargo \$2.50 \$3.75
 - (i) All cargo damaged by either fire or water, when such damage causes unusual distress or obnoxious conditions, and, also, in all cases where men are called upon to handle cargo in the ship under distress conditions.
 - (ii) The damaged cargo rates shall not be paid when sound cargo in a separate compartment is handled."

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- 10. The words "Straight Time", "Straight Time Hourly Rate", "Overtime" and "Overtime Hourly Rate" will be used herein in the sense defined in the Collective Agreement as set forth in Finding No. 9.
- 11. In addition to the wage scale provided for in the Collective Agreement, longshoremen, including the plaintiffs, whenever assigned by stevedores, including the defendants, to perform a specified part of the work calling for additional responsibility, were paid, by custom, additional compensation, called heading differentials, as follows:

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5 cents per hour for work as a "header". (A header is a longshoreman who is in charge of a group of men, usually four, working in the hold of the ship);

5 cents per hour for work as a "gangwayman". (A gangwayman is a longshoreman who is in charge of a group of men, usually four, working on deck); and

15 cents per hour for working as an assistant foreman.

These rates of additional payment were not increased when the employee worked in excess of 40 hours or during "overtime" hours.

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- 12. Under the Collective Agreement, the "overtime hourly rate" is one and a half times the "straight time hourly rate", except that in four instances, the "overtime" rate falls slightly short of that amount as set forth in Finding No. 9. Thus, the "straight time hourly rate" for handling cement in bags is \$1.30 per hour, and the "overtime" rate is \$1.92½ cents per hour and not \$1.95 per hour; the "straight time" rate for handling bulk cargo ballast, and all coal cargoes is \$1.30 per hour, and the "overtime" rate is \$1.92½ cents per hour; the "straight time" rate for handling wet hides, creosoted poles, etc., is \$1.40 per hour, and the "overtime" rate is \$2.02½ cents per hour; the "straight time" rate for handling refrigerator space cargo is \$1.45 per hour, and the "overtime" rate is \$2.07½ per hour.

- 13. The work week commenced on Monday at 7 a. m., and ended the following Monday at 7 a. m.
- there are no regular or usual hours of work. Employment is highly casual in character, more so than employment in any other major industry. This condition is primarily the product of the uncertainties of maritime, shipping and weather conditions, the unpredictable char-

acter of ship and overland cargo arrivals and the use of the "shape" as a hiring device, as defined in Finding No. 16. The casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique.

15. During the period in suit, and for many years prior thereto, longshoring in the Port of New York has had the following characteristics. With rare exceptions, longshoremen do not work regularly or continuously for any one stevedoring company, but shift from employer to employer and from pier to pier as casual workers, working when they want, and when and where work is available. There is no regular weekly, or even daily, employment. Longshoremen may work for more than one employer in a single day, or during the same week. The total number of hours worked in any day or week varies widely. Irregularity of both daily and weekly hours is characteristic of the industry.

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16. Employment of longshoremen is wholly dependent upon the selection of men at one or another of the "shapes" at the head of each pier where work is to be done. At three stated hours during the day, namely at 7.55 a. m., 12.55 p. m. and 6.55 p. m., men seeking employment gather in a group or semicircle, constituting the "shape", at the head of a pier where work is available. The foreman stevedore then selects from the "shape" such men as he desires to hire, to work until "knocked off", that is, told to quit. The selection of a man from the shape carries with it no obligation on the part of the employer concerning any specified length of employment, except for work requirements of the Collective Agreement

1800

Findings of Fact and Conclusions of Law.

relating to minimum hours under specified conditions. The duration of employment depends entirely upon the determination of the stevedore or the steamship company. Where longshoremen work during "straight time" hours, it is customary for the employer to defer until about 4.30 p. m. his decision as to whether the men shall do work after 5 p. m. If it seems likely that night work will be required, the employer may definitely engage the men, or he may order them to shape at 6.55 p. m. If the men are directed to shape at 6.55 p. m. and the employer then decides not to work that night, because of weather conditions or other circumstances relating to the arrival or handling of cargo, he is at liberty not to hire any man at the 6.55 p. m. shape, and thereby he incurs no obligation for compensation. At times the men have been directed to shape up at hours other than the three specified shape hours hereinabove mentioned.

17. Where men have been selected individually at the shape, they are organized into gangs of about 20 men, in charge of a foreman, and put to work loading or unloading a ship. Where a gang has been accustomed to work as a group, it is assigned to a particular hatch or job. A gang may hold together for a few hours, or it. may operate as a unit as long as there is work in the hatch or ship, which may be for less than a day or for more than a week. They may, and sometimes do, work as a group on frequent occasions for one employer, being rehired recurrently at its piers. No gang, however, is employed regularly or steadily. The men are employed only when there is work to be done. At the end of a working period a gang may be told to "knock off", in which event the men would shape again at a later shaping hour, or on the next day, if they so desired if work was available at the pier.

18. During the period in suit, the defendants in some instances adopted the practice of posting notices on bulletin boards of the arrival of ships, of of calling gangs, working customarily together, by a prior notice posted at the pier or by telephonic communication from the stevedoring foreman to the gang leader or hatch boss, and from him, in turn, to the individual men. This practice, however, did not bring about a departure from the established custom that the men shape up at the customary times, regardless of whether they had been working at that pier on the previous day or even earlier the same day.

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- 19. The amount of work which may be available for longshoremen in the Port of New York, and the time of the day or the day of the week when such work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week and season to season.
- 20. Under the terms of the Collective Agreement in effect during the period in suit, and under previous Collective Agreements in effect over a period of many years, the longshoremen in the Port of New York have been obligated to work any night of the week or on Sundays, Holidays or Saturday afternoons, when directed, with special limitations on Saturday nights.

21. In practice, a longshoreman may work on more than one kind of cargo and in more than one capacity during the "straight time" hours or the "overtime

hours' or both.

22. The stevedoring business in the Port of New York prior to World War II, had the following characteristics:

1.

Findings of Fact and Conclusions of Law.

About seven or eight stevedoring companies worked for one steamship company each, whereas about 60 other stevedoring companies, known as contracting stevedores, worked for a number of steamship lines. Before a ship docked in this port, the stevedores knew the vessel's definite or approximate date of departure and also the type of cargo to be discharged or loaded. Thereupon, they made a determination concerning the best way of handling the cargo at the lowest possible cost. Tentative plans for the handling of the cargo were readjusted from time to time on account of delayed arrival, necessity for repairs, delay in arrival of outgoing freight, weather conditions and other factors.

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Stevedoring companies never worked any more "overtime" than was necessary, because it was more economical for the steamship company, and more profitable to the stevedores, to work during "straight time" hours. It was the common practice for stevedoring companies to use auxiliary equipment, and to work the largest number of day gangs within the vessels' limitations of space and equipment. Permission to work "overtime" had to be obtained by the stevedoring company from the steamship company. The decision whether to work "overtime" was controlled by the necessity of meeting scheduled sailing dates in the case of passenger liners, and otherwise by financial considerations turning on whether the over-all cost of a later departure exceeded the cost of "overtime". The contract between stevedoring companies and steamship lines usually previded that the former would be paid on a tonnage basis, plus the actual cost of "overtime", including "overtime" differentials, insurance and Social Security taxes. For the most part, the longshoremen preferred to work during the daytime rather than during the night. The amount of "overtime" that the men worked depended to a con-

siderable extent upon the stevedoring companies by whom they were employed.

- 23. During World War II there was no change in the methods of hiring longshoremen, nor in the terms of the Collective Agreement, except in wage rates. More "overtime" was worked, because of the increased volume of cargo to be handled, larger numbers of ships, shortage of manpower and the wartime necessity of meeting convoy dates. The operation of all ships was taken over by the Army, Navy or War Shipping Administration, and substantially all stevedoring was performed for the account of the United States government. Permission to work "overtime" had to be obtained from the War Shipping Administration or the military authorities. During the war such permission was never refused. The contracts for the stevedoring services were on a tonnage basis.
- 24. Since the end of actual hostilities, the business in the Port of New York has been returning to peace time routine, and in many respects has already reverted to the peace time patterns.
- 25. The steamship companies in the Port of New York 1809 have preferred to confine the handling of cargo to "straight time" hours to the greatest possible extent. They give permission to work "overtime" when such work is unavoidable. The 50 per cent over-riding charge for work done during "overtime" hours is a deterrent becate of the added cost and the intensity of the competition between American ships and ships of foreign registry.
- 26. Stevedoring companies try to avoid working "overtime" hours. Their contracts are entered into on a commodity tonnage basis. When permission is granted

to work "overtime", stevedores receive in addition to the commodity tonnage rate only the actual additional amounts paid out in wages, plus insurance and Social Security tax. "Overtime" work is less efficient than work in "straight time" hours. These factors contribute to the reduction of the stevedore's profits, if his employees are worked "overtime".

27. The International Longshoremen's Association has

sought to avoid "overtime" work, and to confine the work of the longshoremen as largely as possible to the "basic working day" as defined in the Collective Agreement, by making all hours outside of the basic working day "overtime", and by rendering such "overtime" sufficiently expensive so that the employers would avoid it whenever possible. The Union's objective has been to limit work to a normal day such as prevails generally in this country, so that its members might enjoy some of the leisure which was not formerly available to them. With some exceptions that has also been the wish of the individual members of the Union, including the plaintiffs.

Some men, other than the plaintiffs, refused, even in war time, to work during the night, unless it was absolutely unavoidable. The employers found it difficult to get men to turn out for a 6:55 p.m. shape; they not infrequently did not show up at all; or flatly refused to work at night. Meetings were held by the Union's representatives with the military authorities to work out ways and means to avoid the establishment of a precedent for working around the clock.

28 (a). Prior to the Fair Labor Standards Act, the word overtime had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an

Findings of Fact and Conclusions of Law.

1813

indispensable element of the concept of overtime as understood. Overtime was also understood to cover hours outside of a specified clock pattern.

- (b) Prior to the Fair Labor Standards Act, the "overtime" rate of compensation was usually one and one-half times the "straight time" rate. In a few instances the "overtime" rate was increased from one and one-half times to twice the "straight time" rate after a specified number of "overtime" hours had elapsed.
- (c) The purpose of the demand of organized labor, in American industry for penalty compensation for overtime was a two-fold one: to discourage work beyond a certain number of hours per week, and to discourage work during specified periods of the day. It was also prompted by the laborers' desire for a shorter work day, and was not generally intended as a method of increasing earnings. The use of overtime rates of pay did perform the function of preventing substantial amounts of overtime, except during the unusual conditions existing during the war period.

(d) A shift differential is a premium payment for work in either the second or third shift in a plant or industry where more than one shift is worked. The shift differential for the second shift is usually 5 cents or 10 cents per hour, and seldom exceeds 15 cents per hour.

(e) There is a difference between a shift differential and overtime premium. The former is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. The latter is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from

1814

Findings of Fact and Conclusions of Law.

using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50 per cent of the normal rate.

29. Statistical studies of "straight time" and "overtime" work in the Port of New York show:

- (a) For the years 1932 to 1937, inclusive, the records of stevedoring companies, averaging six in number, in such years show that, on the average, 79.93 per cent of the total number of hours worked were within the "basic working day" as defined by the Collective Agreement. During the ten months between the effective date of the Fair Labor Standards Act, October 24, 1938 and August 31, 1939, shortly before the outbreak of the war, the corresponding percentage was 75.03 per cent, based upon a study of 17 stevedoring companies, together handling 70 per cent of the volume of work in the port. During
- 70 per cent of the volume of work in the port. During 1818 the same ten months' period, out of the total number of "overtime" man hours, between 5 p. m. and 8 a. m., excluding Sundays and Holidays, 23.29 per cent was worked by men who had worked no "straight time" hours during the same day; and 42.19 per cent of such total "overtime" hours was worked by men who had previously worked no "straight time" hours or fewer than six "straight time" hours.
 - (b) During both periods mentioned, that is 1932-1937 inclusive, and October 24, 1938 to August 31, 1939, the work performed on Saturday afternoons, Sundays and Holidays, amounted to 4.94 per cent and 7.08 per cent

for each of the two periods respectively, of total man hours; work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and Holidays) constituted 15.13 per cent and 17.89 per cent for each of the two periods respectively, of total man hours; and work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and Holidays) by men who had performed no previous work during the "straight time" working hours of the same day was 2.57 per cent and 4.17 per cent for each of the two periods respectively of total man hours. The percentage of "overtime" man hours in relation to total man hours was 20.07 per cent and 24.97 per cent during each of the periods respectively.

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(c) During the mentioned ten months' period, 8.01 per centre of the longshoremen who worked in the Port of New York worked more than 40 hours a week for one employer. There is no indication, however, as to how many men did, in fact, work for more than one employer during the week and whose total number of hours exceeded 40. The percentage of total hours worked for one employer which is represented by work in excess of 40 hours a week was 2.94 per cent. There was 8.50 times as much contractual "overtime" as there was overtime measured by the number of hours in excess of 40 worked for one employer.

1821

V-E Day, namely the last full year of war experience before V-E Day, namely the last three-quarters of 1944 and the first quarter of 1945, 54.5 per cent of total man hours fell within the "basic working day" as defined by the Collective Agreement; work performed on Saturday afternoons, Sundays and Holidays constituted 20.5 per cent of total man hours; and work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and Holidays) amounted to 25 per cent of total man hours; work performed between 5 p. m. and 8 a. m. (exclusive of Sundays and

Findings of Fact and Conclusions of Law.

Holidays) by men who had done no work previously during the same "straight time" working day was 11.1 per cent of total man hours, 24.4 per cent of total "overtime" man hours and 44.5 per cent of total "overtime" man hours worked between 5 p. m. and 8 s. m. (exclusive of Sundays and Holidays).

is the period referred to in subdivision (d) bove, the concentration of work within the contract "besic working day" was 2.4 times the concentration during the other 16 hours of the day; it was six times as great in the tenmonths period referred to in subdivision (a) above; and

(e) During the last full year of war experience, that

almost eight times as great during the 1932-1937 period.

30. Night work, Sunday work, work on Saturday afternoons and on certain legal Holidays, have been compensated at rates higher than the prevailing day rates in the longshore industry in the fort of New York at least as far back as 1887.

31. In the Port of New York from 1916, when the first agreement was made with the International Longshoremen's Association, down through the period in suit, the Collective Bargaining rates have been as follows for gen-

cargo:		
Year.	Hourly Day Rate*	Hourly Night Ro
1916	40 cents	60 cents
1917	50 "	75 "
1918	65 "	\$1.00
1919	80 "	1.20
1921	65 "	1.00
1922	5 70 "	1.07
1923	80 "	1.20
1927	. 85 ''	1.30
1931	85	1.20
1932	75	1.10
1933	85 "	1.20

Findings of Fact and	Conclusions of	Law.
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Year	Hourly Day Rate	Hourly Night Rate
1934	95 cents	\$1.35
. 1936	\$1,00	1.50
1937	1.05	1.60
1940	1.10	1.65
1941	1.20	1.80
1943	1.25	1.871/2

In the 1916 and 1917 Collective Agreements the words "day work" and "night work" are used. From 1918 to 1937, inclusive, the Agreements identify the lower rate as being payable for the basic working hours, and the higher.

rate is made applicable to "all other time". From 1938 to and including the period in suit, the Agreements speak of "straight time" and "overtime".

32. During the period from 1916 to 1918 the Collective Agreement for the longshore industry for the Port of New York specified one rate of pay for what was termed "day work", and a higher rate of pay for what was termed "night work", and a third rate of pay for work on Sundays and specified Holidays. From 1918 onward the Collective Agreements did not employ the terms 1827 "day" or "night". Night work, and work on Sundays and Holidays were collectively described as "all other work" and were compensated for at a single rate and the

triple rate system was abandoned.

33. In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the Collective Agreement for the longshoremen's industry in the Port of New York introduced, with reference to work at night, Saturday afternoons, Sundays and/Holidays, on general cargo, the terms "overtime" and "overtime which shall be paid for at the overtime rate". The parties, nevertheless,

Findings of Fact and Conclusions of Law.

from the passage of the Fair Labor Standards Act through the period in suit, made no actual change in the general manner of compensating longshoremen as compared with that prevailing previously, except under the circumstances noted in Finding No. 43(a).

34. During most of the period in suit the defendants required some longshore work practically around the clock, day in and day out, except Saturday nights. Defendant Huron employed some groups exclusively on night work. Defendant Bay Ridge assigned its gangs either to day or night work as shipping exigencies required, and its gangs frequently commingled day work with night work on different days in the same working week.

35. No stevedoring company worked exclusively from 8 a. m. to 5 p. m. and Saturday mornings. Even prior to World War II some stevedoring companies had fairly regular recourse to some night work.

36. During the period in suit defendants endeavored to have longshoremen available for work in regular gangs which were called out by defendants to shape up as shipping exigencies required.

Some of the plaintiffs normally sought employment at other piers only when they could not get work at the piers served by the defendants sued herein. Even when ordered out by defendants, however, the gangs were required to shape up in the customary manner and no man had assurance of employment or guarantee of its duration, except for the provisions of the Collective Agreements for minimum hours of pay under specified conditions of employment.

37. The Collective Agreements, since the International Longshoremen's Association organized the longshoremen

in the Port of New York in 1916, reflect the desire and

purposes of the Union to de-casualize employment, to concentrate employment during basic eight-hour day and to avoid "overtime", except when absolutely essential. The "basic working day" has been reduced from ten hours six days a week to eight hours on weekdays and half day on Saturday, and the hours outside such reduced daily schedule were at the same time always classified in the classification entitled to penalty compensation. For many years, including the period in suit, a clause was included in the Collective Agreement, 1832 that "men shall work any night of the week, or on Sundays, Holidays or Saturday afternoons, when required." The unwillingness of the men to work at night is reflected by the provision of the Agreement requiring a minimum of four hours' compensation to men who are ordered to work at 5 or 6 p. m., who were not employed during the afternoon. The "overtime" rate for the most part has been at the conventional time and a half scale. The Collective Agreements did not lemploy the word "overtime" for all hours outside the basic work day until 1938, but the use of the word "overtime" occurs regularly in clauses relating to penalty cargo in all Agreements commencing in 1918. Both the Union and the employers, during their negotiations, referred to such hours as "overtime". In the Award rendered in 1918 by the National Adjustment Commission, the hours outside of the basic work day were labeled "overtime". The Collective Agreement for watchmen provides for a 24-hour day, with three eight-hour shifts.

38. Various employments which are intimately related to the handling of cargo are established on the basis of a working day of eight hours, from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m. This applies to the

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handling of cargo going off the pier by trucking companies and the clerical operations of steamship employees, painters, carpenters, cleaners and the like, and to Custom inspectors. The Collector of Customs at the Port of New York has determined hours, from 8 a. m. to 5 p. m., with one hour out for lunch, to be the normal working day for the loading and unloading of the vessels in the Port of New York. In the case of foreign shipments, work outside of those hours may be carried on only on a special permit issued by the Collector.

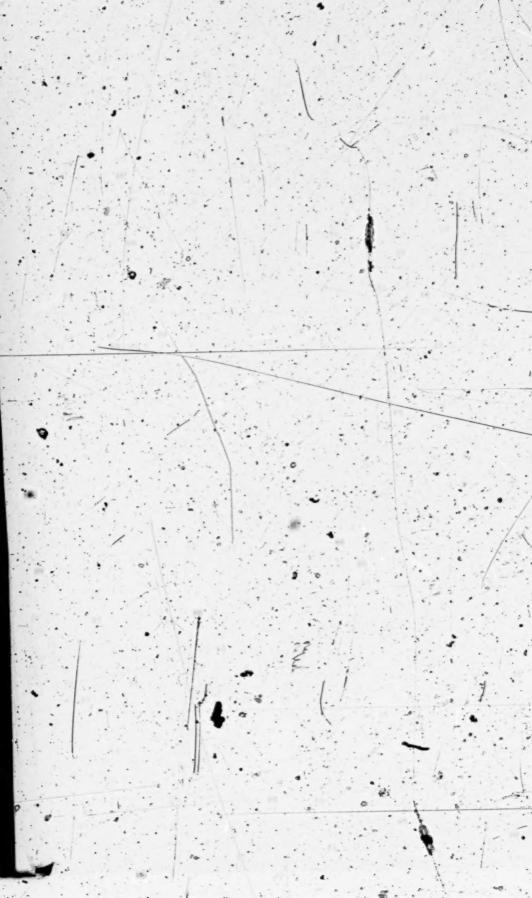
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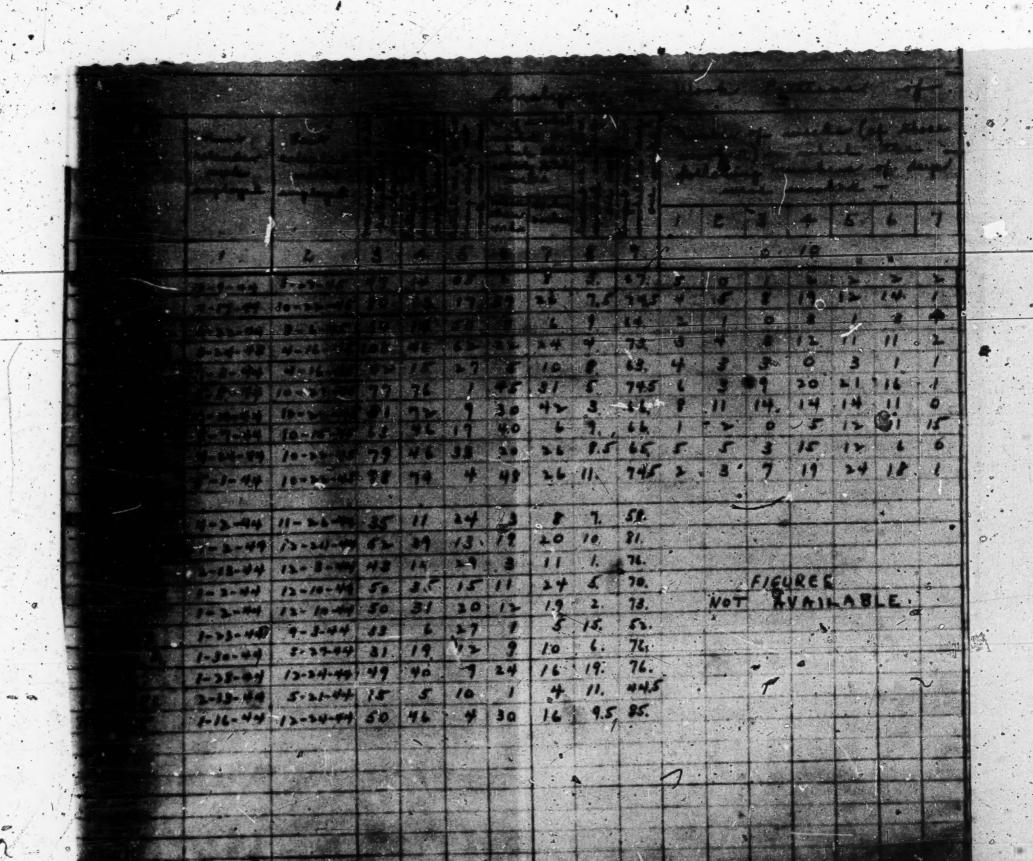
39. The historical development of the Collective Agreements in the longshore industry in the Port of New York has followed the prevailing pattern in organized American industry. The objective of organized labor has been to shorten the total number of weekly hours and frequently to confine daily work to an agreed schedule of approximately eight hours. A mechanism for accomplishing this result has frequently been to schedule an approved tour of daily hours to be compensated for at a straight time rate and to classify all other hours as overtime hours compensable at an overtime rate. The employment of the 50 per cent premium for such overtime hours was designed to constitute a deterrent and not a prohibition. Such 50 per cent premium in the longshore industry has proved to be effective as a deterrent and is responsible for the high degree of concentration of longshore work in the Port of New York

1836

40. The following chart sets forth the work pattern of each of the plaintiffs.

to the basic working day.







Findings of Fact and Conclusions of Law.

41. An examination of the employment record of each of the plaintiffs shows that their work followed no regular pattern. There were many weeks during which they were not employed by the defendants. They worked varying numbers of days in different weeks. The number of hours worked on the days when they did work varied greatly. Many weeks they worked less than 40 hours; other weeks more than 40 hours. They handled a variety of cargoes, and some of them worked at various times as headers, gangwaymen or assistant foremen.

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42. During the period in suit the defendants paid plaintiffs the "straight time hourly rate" for work performed during the contract "straight time" hours and the "overtime hourly rate" for work performed during the contract "overtime" hours, plus the customary differentials for work performed as headers, gangwaymen and assistant foremen. These rates were paid by the defendants regardless of whether plaintiffs worked more or less than 40 hours a week, with the single exception stated in Finding No. 43 (a).

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43 (a). If, and only if, a longshoreman worked more than 40 hours between 8 a. m. and 12 noon, and 1 p. m. and 5 p. m. on Mondays to Fridays, inclusive, and between 8 a. m. and 12 noon on Saturday of that workweek, none of these days being a holiday, he was paid an additional sum for work on Saturday morning in excess of 40 hours—namely 62½ cents per hour, plus, when applicable, the differentials mentioned in Finding No. 11; however, he was not paid an additional 50 per cent of the differentials. In the case of some of the plaintiffs employed by Bay Ridge, namely, Alston, Roper and Tolbert, the testimony was not clear whether they were paid the additional 62½ cents per hour for Saturday morning work under the above circumstances. However, the defendant

Findings of Pact and Conclusions of Law.

1848

Bay Ridge has conceded, for the purpose of this trial, that these three men were not so paid when they worked for that company in New Haven in certain weeks.

- (b) A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being "overtime" hours, was paid the "overtime" hourly rate of \$1.87% an hour, for all hours both within and beyond 40.
- (c) A longshoreman who worked on general cargo 40 hours or more during "overtime" hours, and also worked on Saturday from 8 a. m. to 12 noon during the same workweek, received \$1.87%, the "overtime hourly rate", for the "overtime" hours, and \$1.25, the "straight time hourly rate", for the Saturday hours.
- eight hours on Monday, from 8 a. m. to 5 p. m., and ten "overtime" hours during each of the following four days and also on Saturdays from 8 a. m. to noon, received compensation at the "straight time" rate for Monday and Saturday, and the "overtime" rate for the other hours.
- (e) A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the "overtime" classification, was paid the "overtime hourly rate" of \$1.87½ per hour.
- 1845
- 44. During the period in suit, the plaintiffs, if they so desired, worked Sundays and Holidays whenever work was available to them, just as any other day.
- 45. The "basic working day" and the "basic working week" referred to in the Collective Agreement were not the working day or working week normally, regularly or usually worked by plaintiffs during the period in suit.

Findings of Fact and Conclusions of Law.

- 46. During the period in suit, it was not unusual for the plaintiffs, in their employment by defendants, to start their work on a ship at night rather than by day, and it was not unusual to start their work on Saturday afternoon or Sunday.
- 47. It has been stipulated by the parties that the amounts due the plaintiffs in those situations in which the Court has held that liability exists, are as follows, exclusive of liquidated damages and attorneys' fees:

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	Carl Roper			Market R	8.50
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CONCLUSIONS OF LAW.

- I. The Court has jurisdiction of the parties hereto and of the subject matter of these actions.
- 2. During the period in suit, the plaintiffs enumerated in Finding of Fact No. 2 were employees of defendent Huron Stevedoring Corp., and plaintiffs enumerated is Finding of Fact No. 3 were employees of defendant Bay Ridge Operating Co. Inc. and all were engaged in commerce within the meaning of, and entitled to the benefits of, the Fair Labor Standards Act of 1938 (hereinafter referred to as "the Act").

- 3. The "straight time hourly rate" set forth in each subdivision of Paragraph 4 of the Collective Agreement, as stated in Finding of Fact No. 9, constituted the regular rate at which plaintiffs were employed when handling the stated kind of cargo. During those periods when a plaintiff was employed as a header, gangwayman or assistant foreman, as defined in Finding of Fact No. 11, the regular rate was that applicable to the kind of cargo being handled, plus 5 cents, 5 cents and 15 cents for hour respectively.
- 4. The defendants did not violate Section 7 (a) of the 1850 Act, and did not fail to pay the plaintiffs herein compen sation for their employment in excess of 40 hours during any workweek at a rate not less than one and one-half times the regular rate at which plaintiffs were employed, during the period in suit, in accordance with the provisions of Section 7 (a) of the Act, except (1) in failing to pay some of the plaintiffs in accordance with the pro-visions of that section in some workweeks in which they worked more than 40 hours and some of their work was performed in the capacity of header, gangwayman or assistant foreman; (2) in some workweeks in which they worked more than 40 hours and some of their work was performed on penalty cargo as referred to in Paragraphs 4(b), 4(e), 4(d) or 4(e) of the Collective Agreement, as set forth in Finding of Fact No. 9; (3) with respect to plaintiffs Alston, Roper and Tolbert, in their employment by defendant Bay Ridge, as stipulated and referred to in Finding of Fact No. 43 (a), in certain workweeks when they worked for that defendant in New Haven, Connectient.
- 5. The following plaintiffs are entitled to judgment for unpaid overtime compensation, and are also entitled to

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judgment for an additional equal amount in each liquidated damages, in the amounts set opposite t names respectively below, tog

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6. As stipulated by the parties hereto, the determination of the reasonable attorneys' fees is reserved in ultimate disposition of both the severed actions and the to some they are out to trust by

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Dated: March 4, 1947.

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CARLET OF SEL CREATERS AND AND SE

UNITED STATES DISTRICT COURT,

SOUTHERN DIMENSOT OF NEW YORK.

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HUMON SERVEDORING CORP.

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Defendant.

The issues in the above entitled action having been regularly brought on for trial before Honorable Simon H. Riftind without a jury at a Term of this Court appointed to be held for the trial of civil cases on June 17, 20, 21, 24 and 25, 1946, and the parties having appeared by counsel, and the issues herein having been duly tried upon the proofs submitted in behalf of the respective parties, and the Court having duly rendered its decision and made its Findings of Fact and Conclusions of Law directing that judgment be entered in favor of the following plaintiffs, in the following amounts:

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and the sosts and disbursements of plaintiffs being duly taxed in the sum of \$263.18, and the Court having ordered dishussed on the merits the claims of the following plaintiffs: Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Shurman McGee, Alonso Steele and Whitfield Toppin; and having, pursuant to stipulation of the parties, ordered severed and allowed to re-

Judgment.

main on the docket of this Court claims of all plaintiffs in this action except those named in this judgment, and having, pursuant to stipulation of the parties, reserved determination and award of reasonable counsel fees until ultimate disposition of both the actions of the foregoing plaintiffs and the remaining actions of those plaintiffs whose cases have been permitted to remain upon the docket, and the Court hereby retaining full jurisdiction of the cause for that purpose,

Now, on metion of Max R. Simon, Esq., and Goldwater 1859 & Flynn, Esqs., attorneys for plaintiffs, it is

ADJUDGED that plaintiff Christian Elliott recover of defendant the sum of \$1.46; and it is further . .

Anjunous that plaintiff Joseph Short recover of defendant the sum of \$.70; and it is further

ADJUDGED that the claims and complaints of plaintiffs Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Alonso Steele and Whitfield Toppin are hereby dismissed on the merits; and it is further

ADJUDGED that plaintiffs Christian Elliott and Joseph Short recover of defendant \$263,18 costs; and it is further

ADJUDGED that these plaintiffs have execution therefor. Dated, New York, N. Y., March 28, 1947.

APPROVED:

Smor H. Rokind,
United States District Judge.

Judgment rendered:

WILLIAM CONNECT,
Clerk of the United States,
District Court for the Southern
District of New York.

Judgment.

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UNITED STATES DISTRICT COURT.

Sources Decrees or New York

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BAY BIDGE OFERATERO Co., INC.,

Defendant.

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The issues in the above entitled action having been regularly brought on for trial before Honorable Simon H. Rifkind without a jury at a Term of this Court appointed to be held for the trial of civil cases on June 17, 20, 21, 24 and 25, 1646, and the parties having appeared by counsel, and the issues having been duly tried upon the proofs submitted in behalf of the respective parties, and the Court having duly rendered its decision and made its Findings of Fact and Conclusions of Law directing that judgment be entered in favor of the following plaintiffs, in the following amounts:

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Nathaniel Toll	ert 36.04

and the costs and disbursements of plaintiffs being duly taxed in the sum of \$263.18; and the Court having ordered dismissed on the merits the claims of the following plaintiffs: James Aaron, Albert Green and Mars Stephens, and having, pursuant to stipulation of the parties, ordered severed and allowed to remain on the docket of this Court claims of all plaintiffs in this setion except those named in

this judgment, and having, pursuant to stipulation of the parties, received determination and award of reasonable counsel fees until ultimate disposition of both the actions of the foregoing plaintiffs and the remaining actions of those plaintiffs whose cales have been permitted to remain upon the docket, and the Court hereby retaining full jurisdiction of the cause for that purpose,

Now, on motion of Max R. Simon, Esq., and Goldwater & Flynn, Esqs., attorneys for plaintiffs, it is

Abyunom that plaintiff Albert Alston recover of delegiant the sum of \$10.28; plaintiff James Brooks recover of defendant the sum of \$1.86; plaintiff Louis Carrington acover of defendant the sum of \$4.56; plaintiff James Headrix recover of defendant the sum of \$1.20; plaintiff Autin Johnson recover of defendant the sum of \$3.20; plaintiff Carl Roper recover of defendant the sum of \$17.00 and plaintiff Nathaniel Tolbert recover of defendant the sum of \$36.06; and it is further

ADJUDGED that the claims and complaints of plaintiffs James Aaron, Albert Green and Mary Stephens are hereby dismissed on the merits; and it is further

Anjungen that plaintiffs Albert Alston, James Brooks, Louis Carrington, James Hendrix, Austin Johnson, Carl Roper and Nathaniel Tolbert recover of defendant \$263.18 costs; and it is further

ADJUDORO that these plaintiffs have execution therefor. Dited, New York, N. Y., March 28, 1947.

APPROVED:

United States District Judge.

Judgment rendered:
William Conwins,
Clerk of the United States,
District Court for the Southern
District of New York.

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DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action

File No. 33-212.

Lao Blue, er al.,

Spainst ...

HUBON STEVEDORING CORP.,
Defendant

Civil Action.

File No. 33-213.

JAMES AABON, MT AL.,

against

· BAY RIDGE OFERATING Co. INC.,

Defendant.

Start Court Pares

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dentity form to the party

Please rams sorios that on Tuesday, April 15, 1947, at 10:30 a.m., in Boom 506 of the Federal Courthouse, Foley

Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.

Square, New York City, plaintiffs will move the United States District Court under Rules 52 (b) and 59 (a) of the Federal Rules of Civil Procedure, upon the annexed affidavit of James L. Goldwater, Esq., erified the 7th day of April, 1947, and upon all the proceedings heretofore had herein, for an order granting a new trial in the above actions for the purpose of and to the extent necessary for taking additional testimony, and amending and correcting the Findings of Fact and Conclusions of Law signed by the Court on March 4, 1947 on the ground that:

1871

1. The communication dated May 6, 1946 from Harold C. Nystrom, Chief, Wage-Hour Section in the office of the Administrator of the Wage and Hour Division of the United States Department of Labor, to Lemuel H. Davis, Regional Attorney of the Division in Richmond, Virginia, printed in Appendix A in plaintiffs' printed brief submitted to the Trial Court in these actions, and Tables 1, 3 and 4 presenting certain data compiled by plaintiffs and printed in Appendix B in plaintiffs' printed brief submitted to the Trial Court, which were not available to plaintiffs' attorneys during the trial, should be admitted by the Court to the record in these consolidated cases by the taking of additional testimony.

- 2. The Court erred in including in the findings as signed findings 8-12, 22-29, 37-39, and in receiving the testimony and exhibits upon which these findings were based, and the findings should be amended and corrected to strike these findings.
- 3. The Court omitted to include in its findings as signed certain findings requested by plaintiffs as follows,

Motion for New Trial, to Open Judgment to Take Addi- 1878 tional Testimony, and for Amended and Additional Findings of Fact.

and the findings should now be amended to include as additional findings the following, as originally requested by plaintiffs:

(1) During the period in suit plaintiffs frequently worked for defendants stretches lasting straight through the night and a considerable portion of the next day. Occasionally plaintiffs worked around the clock without stopping except for meal periods, and sometimes they worked 48 hours at a single stretch. 1874 Their compensation in such instances always chang a from the "overtime" to the "straight time" rate, or vice yersa, as the case might be, at 8 a.m. and 5 p.m., respectively, regardless of the number of hours previously worked in the day or week.

(2) During the period in suit plaintiffs looked for work, and were employed by defendants whenever work was available, on Saturday afternoons, Sundays and holidays just the same as on any other day of the week or year. They worked with little less frequency on those days than on any other day of the week or year. It was normal, regular and usual for plaintiffs to work on such days. There were some weeks in which Sunday, or even Sunday night, was the only time in the whole week when plaintiffs found work available.

(3). During the period in suit plaintiffs would have preferred day work but, because they found it extremely difficult to get day work, they worked mostly at night for defendants in order to earn a living. It was normal, regular and usual for them to work at night.

1876 Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.

- (4) During the period in suit a very substantial portion of the work of plaintiffs on Saturdays, Sundays and holidays appears to have been work at night. In the case of the Huron plaintiffs the proportion was 65%.
- (5) Defendant Huron from time to time penalized longshoremen who did not show up for work on a Saturday, Sunday or holiday when their gangs had been ordered out by denying them any work for a full week thereafter.
- (6) During the period in suit defendants, because of the evident reluctance of longshoremen to work at night, found it necessary to recruit gangs to do night work. This was essential to efficient shipping operations.
- (7) During the period in suit plaintiffs were called out to work in gangs by notification from defendants, and defendants thus not only controlled, but determined in advance, the time of day and the day of the week when the particular gangs would be called out.
- (3) During the period in suit plaintiffs in their employment by defendants whenever they worked during one or more of the hours between 5 p.m. and 8 a.m. were compensated by defendants for all such hours at the same rates of pay, namely, the "overtime rates", regardless of whether or not they had previously in the same workday or workweek also worked some hours between 8 a.m. and 12 noon and

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Motion for New Trial, to Open Judgment to Take Addi- 1879. tional Testimony, and for Amended and Additional Findings of Fact.

1 p.m. and 5 p.m. for which they had been compensated at the "straight time" rates and regardless of the number of hours previously worked at the latter. rates.

(9) During the period in suit it was customary, regular and normal for plaintiffs in their employment by defendants to work both Saturday morning and Saturday afternoon if they worked at all that day. Such data as were made available to plaintiffs by defendants indicated that, in the case of Huron employees, in only about 6% of instances did longshoremen work Saturday morning hours without also working Saturday afternoon hours. It was far more common for them to work Saturday afternoon without having previously worked Saturday morning.

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(10) During the period in suit it was customary. regular and normal for plaintiffs in their employment by defendants to work workdays in excess of, and workdays less than, 8 hours per day. Such data as were made available to plaintiffs by defendants indicated that, in the case of-Huron employees, in only about 6% of instances did longshoremen work an 8hour workday; they worked a workday of 11 hours or longer in more than 50% of their workdays.

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4. The Court erred in applying the Fair Labor Standards Act to the facts of the case and its judgment was contrary to law.

Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact.

Please take further notice that defendants may have until 10 days from service hereof with which to submit any affidavit in opposition to this motion.

Dated, New York, N. Y., April 7, 1947.

> Max R. Simon, Esq., 225 West 34 Street, New York, N. Y.

> > and

Goldwater & Flynn, Esqs.

A Member of the Firm. 60 East 42 Street,

New York, N. Y.

Attorneys for Plaintiffs.

To:

1883

John F. X. McGohey, Esq., United States Attorney, Attorney for Defendants, United States Courthouse, Foley Square, New York, N. Y.

Affidavit of James L. Goldwater in Support of Motion for New Trial, Etc.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK, CITY AND COUNTY OF NEW YORK, SS.: 1886

- JAMES L. GOLDWATER, being duly sworn, deposes and
- 1. I am an attorney associated with Goldwater & Flynn, Esqs. who are co-counsel with Max R. Simon, Esq. as attorneys for plaintiffs in the above entitled actions which were consolidated for trial and tried by this Court in June of 1946. I am familiar with all of the proceedings heretofore had in the actions, having been personally charged with their conduct.

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2. This affidavit is submitted in support of motions under Rules 59 (a) and 52 (b) of the Rules of Civil Procedure for the District Courts of the United States for an order granting to plaintiffs a new trial for the purpose of and to the extent necessary for obtaining the re-opening of the record here to receive as testimony certain exhibits which were submitted to the Court in appendices to plaintiffs' brief following trial but which were not available at the time when the parties rested for offer as exhibits of record. These exhibits have an important bearing upon the case, and were presumably considered by the Trial

Court in arriving at its decision. Further, the defendants had ample opportunity in the permission accorded for the submission of reply briefs to comment upon and answer to any of the matters presented by the exhibits in question prior to the decision of the Court and cannot now claim to be surprised by this application.

3. There are two other items of relief sought by this application. The Court is asked to strike all findings related to certain lines of proof developed as part of defendants' case on the ground that the evidence upon which these findings were based was improperly admitted and received and the resulting judgment represents an improper application of the Fair Labor Standards Act of 1938 to the appropriate facts and is contrary to law. Further, plaintiffs ask for the amendment of the findings to include additional items which were originally requested by plaintiffs but omitted from the findings as signed, apparently through oversight. These cover items of proof not embraced within the scope of other findings and in their absence the findings do not completely and adequately cover the case. Some of these matters will be discussed in

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greater detail hereafter.

- 4. On January 21, 1946 deponent wrote Marvin C. Taylor, Esq., the member of the staff of the Attorney General of the United States who later tried this case for defendants and who was then engaged in its preparation. The letter included, in part, the following request:
 - "May we also request that you advise us promptly as to when we may be furnished with the following information which we have requested of you in our previous discussions, in keeping with our agreement to proceed informally with the pre-trial developments:
 - 1. Copies of any opinions rendered by the Administrator of the Wage and Hour Division or the

Solicitor of Labor or representatives of either covering the question at issue in these cases.

- Copies of any surveys, statistical reports or studies in your possession prepared by the United States Bureau of Labor Statistics, or any other subsidiary office of the United States Department of Labor, at your request, in connection with the question at issue.
- 3. Copies of any surveys, statistical reports or studies prepared by professional economists, economic departments of universities, or other similar authorities, at your request, in connection with the question at issue.

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• • • We also make the request on the ground that a substantial amount of this material and data was acquired by your office in its official capacity as a representative of the United States Government, calling upon other agencies of the United States Government for available data or the assembling of such date. As we understand it, it is the policy of the United States' Department of Labor and other Government departments, when furnishing such data to representatives of the parties upon one side of a controversy, to also furnish copies to representatives upon the other side. We believe that fairness in the dealings of the Government with the public also would require this. Finally, may we suggest that fair consideration of our request at this time may expedite preparation of these cases for prompt trial without the need of the usual formal pre-trial procedure before the Court."

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In fairness to Mr. Taylor, we admit at this point that he subsequently wrote us that "no commitments whatever were made" with regard to this type of material at pre-

vious discussions between the attorneys and, at a later date, "that his response to this suggestion was that you should promptly initiate any steps in this direction which you have in mind and that whatever you may do is a matter for your own decision rather than a matter for agreement between your office and ours". Subsequently, we advised Mr. Taylor by letters dated March 20, 1946 and April 13, 1946, of the need for receiving an adequate pre-trial discovery of the matters covered by our previous communication and in the latter communication we referred to letters written by the Wage and Hour Division to correspondents, whom we mentioned by name, copies of which we were sure must have been made available to the Government in the course of preparing its defense.

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5. In completing preparation for trial, Mr. Taylor made available to plaintiff's attorneys at the end of May or beginning of June copies of several letter opinions of various officers of the Wage and Hour Division. These were subsequently introduced into evidence by the parties as Plaintiffs' Exhibit 18 and Defendants' Exhibits N and O. Since the consolidated cases were tried in June, there was not available to the parties, however, before both sides rested, a copy of a communication dated May 6, 1946 from Harold C. Nystrom, Chief, Wage-Hour Section of the United States Department of Labor, to Lemuel H. Davis, Regional Attorney of the Division in Richmond, Virginia. So that the Court would have before it all of the possibly applicable material bearing upon the important questions involved in these cases, plaintiffs printed this communication in Appendix A to the brief submitted to the Court after trial. A copy of this opinion as there included is annexed to this affidavit as Exhibit A and made a part of these motion papers.

6. Shortly before the trial, upon the signing of various stipulations to simplify the trial procedure, defendants

made available to plaintiffs certain statistical data, which the Government had had prepared in connection with the defense, covering stevedoring operations in the Port of New York over many years, but not embracing a period of time contemporaneous with any part of plaintiffs' period of employment. Over plaintiffs' opposition, this data in tabular form was subsequently admitted in evidence as Defendants' Exhibits D and E. Only upon the eve of the trial did defendants make available a table containing statistical data relating to stevedoring operations in the Port of New York covering a period contemporaneous with plaintiffs' employment. Over plaintiffs' opposition, this was subsequently admitted in evidence as Defendants' Exhibit J.

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- 7. Plaintiffs could not, during the trial, arrange for the compilation of statistical data in an attempt to meet the effect of Defendants' Exhibit J. Mr. Taylor had previously told the plaintiffs that while some work had been done upon a statistical survey covering a period contemporaneous with plaintiffs' employment, he did not believe that he would have it ready in time for the trial. As soon as the trial was completed counsel prepared from the rather limited data, which defendants had made available to plaintiffs in the form of records transcripts upon the examination before trial of defendants, Tables 1, 3 and 4 of Appendix B to plaintiffs' printed brief submitted to the Trial Court after the trial. Copies of these tables in the exact form in which they were previously printed are annexed to this affidavit as Exhibits B-1, B-2 and B-3, respectively, and made a part of these motion papers.
- 8. In the interest of justice, to admit into the record material which plaintiffs could not obtain in time for the trial but which was available to the Trial Court at the time of its decision, it is submitted that the Court should grant

S. Ct.

Affidavit of James L. Goldwater.

a new trial to the extent necessary to re-open the record under Rule 59 (a) for the purpose of admitting Exhibits A and B annexed hereto as additional testimony.

9. Also in this motion the Court is requested to strike numerous findings from the Findings of Fact and Conclusions of Law as signed. The findings referred to all relate either to the statistical surveys previously referred to, or to certain collective agreements covering longshore operations in the Port of New York or to general conditions or characteristics of stevedoring operations unrelated to the work of plaintiffs in their employ by the defendants in these two cases. The motion in this regard is based upon plaintiffs' contention that these matters are not relevant to their claims in any way and not binding upon them, and the Court thus erred in permitting, over plaintiffs' opposition, the lines of testimony upon which these findings were based; and also upon the holding by the Supreme Court of the United States that matters of custom and collective contract do not control in testing compliance with Section 7 of the Fair Labor Standards Act. Tennessee Coal Co.w. Muscoda Local No. 123, 321 U.S. 590; Jewell Ridge Coal Corp. v. Local 6167, 325 U.S. 161; Walling v. Helmerich & Payne, 323 U. S. 37; Walling v. Harnischfeger Corp., 325 U. S. 427; see also Walling v. Alaska Pacific Consol. Mining Co., 152 F. (2d) 812, cert. den. 66 S. Ct. 960; Robertson v. Alaska Gold Mining Co., 157 F. (2d) 876, cert. den.

Wherefore, plaintiffs pray for the relief applied for by this motion.

(Sworn to by James L. Goldwater on April 7, 1947.)

Exhibit A, Annexed to Foregoing Affidavit.

1903

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

July 31, 1946

Legal Field Letter No. 109

Attached Opinions

Copies of recent opinions on subjects indicated below. are furnished herewith for your information and proper 1904 notation in the Index to Legal Field Letters.

> SOL:ERG:YS May 6, 1946

To

Lemuel H. Davis, Regional Attorney Richmond, Virginia

From

Harold C. Nystrom Chief, Wage-Hour Section

1905

Subject

Federal Lithograph Company Washington, D. C. File No. 8-817

This will reply to your memorandum of June 13, 1945 transmitting the subject file in which you inquire whether premium compensation paid for night contract work to different groups of subject's employees constitutes extra compensation creditable—in whole or in part—against the

overtime required to be paid under the Walsh-Healey and Fair Labor Standards Acts. Since your inquiry raised questions analogous to those involved in several cases concerning stevedores (now in litigation), our reply was necessarily delayed pending consideration of this matter both by this office and by the Solicitor's Office in

Washington.

The file indicates that beginning with July 1942, subject firm has been reproducing books, pamphlets, orders, releases, etc., for the Government Printing Office. Certain of the Government contracts call for what is known as "overnight" service. The GPO sends up the orders to be printed each night, and the firm is required to have such orders completed by 8 a. m. the following day. The inspector's narrative report in the file states that the employer hand-picked several of his best employees to perform this night work. Some were to work only at night; some were to work on other work during the day and to work for a while at night on these contracts; still others were to alternate on the day shift for a while and then on the night shift for a while. The inspector states that subject firm "set up night rates of approximately 11/2 times the regular day rates for most of the employees. Some rates were set up at double time. Some at slightly less than time and one-half others at slightly more than time and one-half. The employer explained that he had set up these rates this way to eliminate bookkeeping as he figures that he was paying all employees working at the night rate at least time and one-half the employee's regu-

The inspector considered the company in violation, stating: " • these rates were paid for all hours worked regardless of whether or not they were overtime hours and therefore became the employees' regular rate of pay for work performed at night." The file further reveals

lar rate of pay-the day rate."

1907

that some employees night rates started at 8 p. m., some at 9 p. m., some at 10 p. m., some at 11 p. m. and some at 12 p. m. Certain of the information contained in the file indicates that this premium compensation is paid only for work performed at night on GPO contracts although elsewhere in the file it is suggested that, with respect to regular nightshift employees, premium compensation is paid regardless of the character of the work performed at night.

According to your memorandum of June 13 and Regional Director Cole's memorandum of June 2, 1945, the company's wage differential plan consists of paying employees who have already worked on the day shift double time for all night work performed. Those emplovees who have not worked on the day shift, but who work on the night shift only, are paid the regular dayshift rate plus an additional half time for all hours worked on the night shift. These mates, you state, are paid "for work performed at night regardless of the number of hours worked during the week." You do not explain the basis on which it appears, as the file indicates, that certain of the dayshift employees receive only an additional half time for work performed at night, although it may be that double time is paid such employees for work on the night shift only when such work is performed on GPO contracts. See, for example, the pay-roll transcriptions of Robert Wathen. See, also, the employee statements of Olin Merchant and Max Guervitz in the file. It is your opinion, and that of Regional Director Cole, that overtime violations of both the Walsh-Healey and Fair Labor Standards Acts have occurred during weeks in which more than 40 hours were worked on one or both shifts and during 24-hour periods where more than 8 hours were worked. Thus, Regional Director Cole points out that if an employee works on a night

1910

shift only, he will receive the regular day-shift rate plus an additional half time, regardless of whether he works 20 hours, 35 hours, or 60 hours in the week.

After reviewing subject file, we are of the opinion that the premium rates paid to regular night-shift employees for night-shift work constitute higher straight-time rates of pay, rather than overtime compensation -creditable against the overtime required to be paid under the Walsh-Healey and Fair Labor Standards Acts. See, in this connection, the opinion expressed in Field Operations Bulletin, Vol. VII, No. 12, pages 207, 208. Insofar as the regular night-shift employees are concerned who, in general, receive time and one-half the day-shift rate for all work performed at night), it seems clear that such compensation represents merely a higher rate of pay for the more onerous work performed at night. Since such an employee is paid at the premium rate regardless of the number of hours worked during the week, and since the hours worked at night by such an employee represents his normal working hours, we do not perceive any basis for holding that such premium pay constitutes overtime compensation. See, in this connection, Julia O'Toole's state-. ment in the file which states that she begins work at 12 midnight and works until 8 a. m.; is now paid 90 cents per hour; that girls working on the night shift are paid at a higher rate than those working on the day shift; and that "it was not my understanding that this was an overtime rate but I was told that this would be equivalent to overtime." See, also, the employee statement of George Hummer Cf. Roger M, Doyle's pay-roll records indicating that he was paid at the night-shift rate of \$3 an hour, regardless of the fact that during given workweeks he performed no work at all during the day; also, E. A. Gayor's statement and pay-roll transcriptions indicating that during the weeks ending July 10, 17; 24, 31 and

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Exhibit A, Annexed to Foregoing Affidavit.

1915

August 7, 1942, he was paid at the flat rate of \$2 an hour for a 60-hour week, although he did not perform any work at all on the day shift during such weeks.

. A like conclusion appears warranted with respect to the day-shift employees who are paid s milar premium rates for work performed on the night shift. While, in the normal case, the payment of a premium rate for night work to one who has also performed day work during that day is evidence that the premium is overtime, a different result obtains here because it appears that the premium compensation would have been paid even in the absence of the performance of day work by the employee on that day. See, in this connection, Floyd S. Schrider's statement and payroll transcriptions in the file.

1916

With respect to the regular day-shift employees who receive double time at night, we do not believe the facts are sufficiently clear, in the present state of the file, to. enable us to definitely determine whether all or only part of that double time compensation constitutes straight-timepay under the Acts. In our opinion, the facts on this point should he further developed along the lines indi-The double time would be considered cated below. straight-time compensation if it is paid solely because the 1917 employee is employed on GPO work and not because he had previously performed day work that same day. this connection it would be important to ascertain whether an employee who works only at night on a given day is paid double time when working on GPO jobs and time and one-half when working on non-GPO jobs. Similarly, it would be significant to ascertain whether an employee who has performed work during the day and is asked to work at night on non-GPO jobs that same day is paid double time or time and one-half, also, the rate paid under the same circumstances when he is employed on GPO work.

The subject file is returned herewith.

Exhibit B-1, Annexed to Foregoing Affidavit.

Table 1

INCIDENCE OF ACTUAL WORK-DAY LENGTH FOR 64 LONGSHOREMEN PLAINTIFFS IN THE

HURON CASE.

	HUI	RON CASE	10
	No. of	No. of	
	Hours	Instance	8
	11/2	0 3	
	2	17	
	21/2	1	
	3	7	
	31/2	23	•
1919	. 4	114	
	41/2	25	
	5	62	
1	51/2	3	
	6	50	
	61/2		MI- W
	7	31	
		31	
	71/2	153 —	= 6.3% of Total
	81/2	39	-0.5/0 01 1000
	9	83	
		21	
1920	91/2	427	
2020	10	2	
	101/2	1244	
	11		
	111/2	. 2	
	12	11	(9)
	121/2	1'	
	13	28	
	131/2		
	14	4	
	181/2	1	
	19	2	
	20	1	
	21	1	
	0.		1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1

Grand Total 2414

^{*}These data are derived from record transcripts submitted to plaintiffs by defendants prior to trial and include the 10 selected Huron plaintiffs. The period covered is that of the litigation.

Exhibit B-2, Annexed to Foregoing Affidavit.

Table 3

DISTRIBUTION OF INSTANCES OF WORK AND LACK OF WORK ON EACH DAY OF WEEKS IN WHICH SOME WORK WAS PERFORMED BY 64 LONGSHOREMEN PLAINTIFFS IN THE HURON CASE*

	Instances where employee worked	Instances where employee did not work	,	
Monday	396	194	1922	
Tuesday	386	204		
Wednesday	386	204		
Thursday	376	214		
Friday	385	205		
Saturday†	140	450		
Sunday	346	244		
Total	2,415	1,715	1923	

^{*}These data are derived from record transcripts submitted to plaintiffs by defendants prior to trial and include the 10 selected plaintiffs. The period covered is that of the litigation. The same data could not be compiled for Bay Ridge employees, because the record transcriptions supplied in the case of that defendant did not show breakdown of hours as between days of the week.

[†] Since the union contract forbids work on Saturday night, theoretically the maximum possible hours which could be worked on Saturday, including the noon meal hour, would be 9 as compared with 24 on any other day. The relation of 9 to 24 is 371/2%. According to the law of mathematical possibilities, the distribution of instances worked on Saturday should, therefore, be expected to approximate 371/2% of instances of work on other days. The ratio of Saturday work (140) to the average for all other days of the week (379) is 37%.

Exhibit B-3, Annexed to Foregoing Affidavit.

Table 4

DISTRIBUTION OF INSTANCES OF WORK ON SATURDAYS AND SUNDAYS ACTUALLY PER-FORMED AT NIGHT IN THE CASE OF THE TEN SELECTED PLAINTIFFS IN THE HURON CASE.

		Sati	urday Night	Sun Day	day Night	Day	
1925	Blue	6		6	1	12	1
1325	Dixon		3		44	0	47
	Elliott	10		10	ii.	. 20	0
	Fleetwood	22	3	.19	3	41	6
	Fuller	6		5	2	. 11	2
	Johnson		. 3		60	. 0	63
	McGee		1		49	. 0	50
1	Short	31		30	2	61	. 2
14	Steele				34	. 0	34
1926	Toppin		4		56	0	60
			Тота	L Insta	NCES	145	265

*The source of the above is payroll data transcribed in Plaintiffs' Exhibit?.

Transcript of the same data could not be compiled for Bay Ridge employees because the record transcriptions supplied for that defendant did not show breakdown of hours as between days of the week.

In tabulating the data use has been made of the fact appearing in para 7 of Plaintiffs' Exhibit 7 as supplemented to the effect that wherever 11 hours appears in the transcripts on any calendar day (with one exception in the case of one man in one week) this always signifies work at night. Recourse has also been had to the benefit of testimony and analysis of the record transcripts indicating that the men in the regular night gangs always worked nights. It follows that they worked nights on Saturdays and Sundays for all hours they worked on those days though less than 11.

Order of Hon. Simon H. Rifkind Denying Motion for New Trial, to Open Judgment to Take Additional Testimony, and for Amended and Additional Findings of Fact. 1927

Motion denied—April 14, 1947.

Motion denied—April 14, 1947.

Simon H. Rifkind U. S. D. J.

Notice of Appeal,

1928

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES AARON, ET AL.,

Plaintiffs,

against

BAY RIDGE OPERATING Co. INC.,

Defendant. 1929

SIR:

Notice is hereby given that plaintiffs James Aaron, Albert Green and Mars Stephens hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947 and from each and every part thereof; and

FURTHER NOTICE IS HEREBY GIVEN that plaintiffs Albert Alston, James Brooks, Louis Carrington, James Hendrix.

Notice of Appeal.

Austin Johnson, Carl Roper and Nathaniel Tolbert hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947 on the ground that the judgment was inadequate and did not represent the full amount to which they were respectively entitled.

FURTHER NOTICE IS HEREBY GIVEN that all plaintiffs appeal to the United States Circuit Court of Appeals for the Second Circuit from the final order in the action dated April 14, 1947 denying plaintiffs' motion for a new trial to open the record to take additional testimony to admit additional exhibits, and for amended, corrected and additional findings of fact, and from every part thereof.

Dated, New York, N. Y., April 17, 1947.

MAX R. SIMON, Esq. and GOLDWATER & FLYNN, Esqs.

By James L. Goldwater, A member of the firm. Attorneys for Plaintiffs, 60 East 42 Street, New York, N. Y.

1932

1931

To:

JOHN F. X. McGohev, Esq.,
United States Attorney,
Attorney for Defendant,
United States Courthouse,
Foley Square,
New York, N. Y.

Notice of Appeal.

1933

1934

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 33-212.

0

LEO BLUE, et al.,

Plaintiffs.

against

HUBON STEVEDORING CORP.,

B

Defendant.

SIR:

Notice is hereby given that plaintiffs Leo Blue, Nathaniel Dixon, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Alonzo Steele and Whitfield Toppin hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947, and from each and every part thereof; and

FURTHER NOTICE IS HEREBY GIVEN that plaintiffs Christian Elliott and Joseph Short hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final judgment in this action entered on the 28th day of March, 1947 on the ground that the judgment was inadequate and did not represent the full amount to which they were respectively entitled.

FURTHER NOTICE IS HEREBY GIVEN that all plaintiffs appeal to the United States Circuit Court of Appeals for the Second Circuit from the final order in the action dated April 14, 1947 denying plaintiffs' motion for a new trial to

1935

Notice of Appeal.

open the record to take additional testimony to admit additional exhibits, and for amended, corrected and additional findings of fact, and from every part thereof.

Dated, New York, N. Y., April 17, 1947.

Max R. Simon, Esq. and Goldwater & Flynn, Esqs.

By James L. Goldwater,
A member of the firm.
Attorneys for Plaintiffs,
60 East 42 Street,
New York, N. Y.

1937

To:

John F. X. McGoher, Esq.,
United States Attorney,
Attorney for Defendant,
United States Courthouse;
Foley Square,
New York, N. Y.

1938

Stipulation Modifying Captions as to All Pleadings in Printing of Record on Appeal.

1939

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK

James Aaron, Albert Alston, James Philip Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel Tolbert,

1940

against

BAY RIDGE OPERATING Co., INC.,

Defendant-Appellee.

Plaintiffs-Appellants,

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGee, Joseph Short, Alonzo E. Steele, and Whitfield Toppin,

Plaintiffs-Appellants, 1941

against

HURON STEVEDORING CORP.,

Defendant-Appellee.

It is hereby stipulated by and between the attorneys for the parties to the above entitled actions that in printing the record on appeal in Civil Actions Nos. 33-212 and 33-213, the captions in the pleadings and in any reference to 1942 Stipulation Modifying Captions as to All Pleadings in Printing of Record on Appeal.

the cases which are the subject of this appeal shall read as above set out, so that there shall appear in the captions the names only of those ten plaintiffs in each case whose claims were severed out and separately tried, omitting the names of all other plaintiffs in each case.

Dated New York, N. Y., April 14, 1947.

MAX R. SIMON and GOLDWATER & FLYNN,

By James L. Goldwater,

Attorneys for Plaintiffs-Appellants.

JOHN F. X. McGoney,

By MARVIN C. TAYLOR, Attorney for Defendants-Respondents.

Stipulation Dispensing With Printing of Certain Exhibits in the Record on Appeal.

1945

UNITED STATES DISTRICT COURT.

Southern District of New York.

SAME TITLE

It is HEREBY STIPULATED by and between the attorneys for the parties to the above entitled action that the following exhibits, introduced in evidence by the parties at the trial of the action, need not be reproduced in the record on appeal but the originals thereof may be sent to the United States Circuit Court of Appeals for the Second Circuit in lieu of copies thereof, or handed up on the argument of the appeal for inspection by the court as if reproduced in the record on appeal in full: (a) Plaintiffs' Exhibits 7, 8, 11, 12, 13, 15, 16, 17; (b) Defendants' Exhibits A, D, E, F, G, H, J, M.

1946

It is further stipulated and agreed by and between the attorneys for the parties that the foregoing exhibits shall be entrusted to the attorneys for plaintiffs for exhibition to the United States Circuit Court of Appeals for the Sec- 1947 ond Circuit upon the argument of the appeal herein and shall then be delivered to the Clerk of the Court subject to the Court's further order in regard thereto.

Dated New York, N. Y., April 14, 1947.

MAX R. SIMON and GOLDWATER & FLYNN,

By JAMES L. GOLDWATER, Attorneys for Plaintiffs-Appellants.

JOHN F. X. McGoney,

By MARVIN C. TAYLOR, Attorney for Defendants-Respondents. 1949

Stipulation as to Contents of Record.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The parties hereto by their respective attorneys stipulate and agree that the record on appeal of the plaintiffs from the judgment of this court rendered the 28th day of March, 1947,, shall be constituted of the portions of the record, proceedings and evidence in the case as set out herein below, such portions of the record, proceedings and evidence being designated as the record on appeal:

- 1. Statement under Rule XV, subdivision (b).
- 2. Complaint in each case.
- 3. Answer in each case.
- 4. Stipulation in Civil Action No. 33-212 severing for immediate trial the claims of Leo Blue and nine other named plaintiffs against defendant Huron Stevedoring Corp. (Pl. Ex. 5).
- 5. Stipulation in Civil Action No. 33-213 severing for immediate trial the claims of James Aaron and nine other named plaintiffs against defendant Bay Ridge Operating Co. Inc. (Pl. Ex. 6).
- 6. Stipulation consolidating for trial Civil Actions Nos. 33-212 and 33-213.
- 7. Transcript of stenographic minutes.
- 8. Plaintiffs' Exhibits 5, 6, 7, 8, 11, 12, 13, 15, 16, 17, 18, 19; Defendants' Exhibits A, B, C, D, E, F, G, H, J, M, N and O.
- Stipulation of the attorneys for the parties dispensing with the printing of certain exhibits in

1950

1958

- the transcript of record on appeal, and permitting one copy of each to be handed up on the argument of the appeal.
- Opinion of Hon. Simon H. Rifkind filed January 6, 1947.
- 11. Findings of Fact and Conclusions of Law filed.

 March 4, 1947.
- 12. Judgment rendered March 28, 1947 in each case.
- 13. Motion for a new trial to open the record and for corrected and amended findings, with annexed affidavit and exhibits, served and filed by plaintiffs April 7, 1947.
- 14. Order of Hon. Simon H. Rifkind denying motion to open the record and for corrected and amended findings; dated April 14, 1947.
- 15. Plaintiffs' notices of appeal in the respective cases, filed April 17, 1947.
- 16. Stipulation of the attorneys for the parties permitting the captions of all pleadings to be revised in printing the record on appeal.
- 17. Designation of portions of record, proceedings and evidence comprising the record on appeal (this stipulation).

Dated, New York, N. Y., April 14, 1947.

MAX R. SIMON and GOLDWATER & FLYNN,

By James L. Goldwater,
Attorneys for Plaintiffs-Appellants.

JOHN F. X. McGOHEY,

By Marvin C. Taylor,
Attorney for Defendants Respondents.

1956

Stipulation Settling Record.

UNITED STATES DISTRICT COURT,
Southern District of New York.

[SAME TITLE]

1955 a true transcript of the record of the District Court in the above entitled matter, as agreed upon by the parties.

Dated, April , 1947.

"MAX B. SIMON and GOLDWATER & FLYNN,

By James L. Goldwater, Attorneys for Plaintiffs-Appellants.

JOHN F. X. McGohey,

By Marvin C. Taylor,
Attorney for Defendants-Respondents.

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

I, WM. V. CONNELL, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties.

1958

Court to be hereunto affixed at the Borough of Manhattan, City of New York, in the Southern District of New York, this day of in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the United States, one hundred and seventy-first.

(Seal)

WM. V. CONNELL, Clerk.

1959



UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 272 and 273. October Term, 1946

(Argued May 9, 1947.—Decided June 3, 1947)

Docket Nos. 20619 and 20620

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS
CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON,
CARL L. ROPER, MARS STEPHENS, AND NATHANIAL TOLBERT,
PLAINTIFFS-APPELLANTS

BAY RIDGE OPERATING CO., INC., DEFENDANT-APPELLEE

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEET-WOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHEBMAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE, AND WHITFIELD TOPPIN, PLAINTIPPS-APPELLANTS

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

Before: SWAN, AUGUSTUS N. HAND, AND FRANK, Circuit Judges

Appeals by the plaintiffs from judgments entered by the United States District Court for the Southern District of New York in two actions consolidated for purposes of trial, insofar as the judgments are adverse to plaintiffs. Reversed and Remanded.

MAX R. SIMON AND GOLDWATER & FLYNN (Monroe Goldwater, Max R. Simon, James L. Goldwater, and Joseph E. O'Grady, of counsel) for plaintiffs-appellants

JOHN F. X. McGohey, John F. Sonnett, J. Francis Hayden, Marvin C. Taylor and Mary L. Schleifer, for defendantsappellees

The opinion of the trial court is reported in 69 Fed. Supp.

FRANK, Circuit Judge.

Section 7 (a) of the Fair Labor Standards Act (29 U. S. C. A. § 201 et seq.) provides: "No employer shall. " " employ any of his employees " " for a workweek longer than forty hours " " unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. The fundamental question before us here turns on the interpretation of "regular rates." Since ours is but an intermediate court, of course, in construing those words we are bound

by the pertinent decisions of the Supreme Court.

These appeals are from judgments to the extent that they are adverse to plaintiffs, longshoremen working in the Port of New York, who maintain that defendants violated the Act by not paying plaintiffs one and one-half times the "regular rate" for hours, in certain workweeks, in which plaintiffs worked for defendants in excess of forty hours. It is urged by the defendants that the "regular rate" is controlled by provisions of collective bargaining agreements between the defendants and the union, International Longshoremen's Association, to which plaintiffs belonged in the years in question. The annual collective agreements made with this union since 1921 have provided for a "basic working day" of eight hours and a "basic working week" of forty-four hours. ginning in 1918, these agreements fixed two sets of hourly rates: (1) Specified hourly rates were set for "work performed from 8 a. m. to 12 noon and from 1 p. m. to 5 p. m., Monday to Friday inclusive, and from 8 a. m. to 12 noon Saturday." (2) With a few exceptions, one and one-half times these rates, were fixed for what the agreements called "all other time." In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the agreement changed the labels for these respective periods: The first was now

called "straight time"; the second was now called "overtime," the rates for that period being newly described as "overtime rates." This nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits. No other significant changes were made in the agreements after the Act went into effect.

During the years 1943-1945, here involved, in most instances the defendants applied the terms of these agreements in paying the plaintiffs. As a result, if one of the plaintiffs in a given week worked, say, fifty hours during the so-called "overtime" period, he received for the excess ten hours precisely the same rate per hour as he was paid for the forty hours; that is, he received merely the contract rate—called the "overtime rate" in the contract—for all the fifty hours. If, in a given workweek, he worked thirty hours during the so-called "straight time" period and twenty hours in the so-called "overtime" period, again he received merely the

[&]quot;4. Wage Scale: The wage scale shall be as follows:

General cargo agreement	Straight	Over- time
	1.50	-
General Cargo of every description including barrel oil when part of		
General Cargo, and all General Cargo handled in refrigerator space	1. 1. 1.	1.1
with the temperature above freezing	\$1.25	\$1.879
Bulk Cargo, ballast, and all coal cargoes, including loading and trim-	1	
ming coal for a ship's own bunker purposes	1.30	1. 925
Cement in bags	1.30	1. 925
Wet hides, creosoted poles, creosoted ties, creosoted shingles, and soda		
ash in begy	1.40	2.023
Refrigerator space cargo-meats, fowls, and other similar cargo-which		
is to be transported with the temperature in the refrigerator at frees-		
ing or lower; these rates shall be paid the full gang	1.45	2.073
Kerosene, gasoline and naphtha in cases and barrels, when loaded by		
case oil gangs, and with a fly	1.45	2.17
Explosives	2.50	3, 75
(i) When handled down the Bay, the time shall start from the time	1 1	- 10
when men leave the pier until the time they return to pier.		
(ii) When handled down the Bay, men shall supply their own	100	. A.
meals, but \$1.00 per meal shall be allowed by the employer.		
(iii) When explosives, such as are customarily handled down the	1111	-1
Bay are handled at any pier, men shall be paid at the Explo-		
sive rate of pay.		1
(iv) Any dispute as to what explosives are, shall be settled by the		
Bureau of Explosives whose decision shall be final and shall		
be accepted by both sides.	00.00	
Damaged Cargo	\$2.50	\$3.7
(i) All cargo damaged by either fire or water, when such damage		- 1
causes unusual distress or obnoxious conditions, and, also, in		.0
all cases where men are called upon to handle cargo in the	1.	
ship under distress conditions.		1 22
(ii) The damaged cargo rates shall not be paid when sound cargo in		
a separate compartment is handled."		

One change is noted in the trial court's Findings 33 and 43a, which appear in the Appendix to this opinion.

The agreement contained the following "wages scale";

contract rates; that is, for the excess ten hours, he received merely

the contractually labelled "overtime rate." 2

The trial judge held this method of payment correct, on the ground that the rates fixed in the agreements for the "straight time" period constituted the "regular rate" referred to in § 7 (a) of the Act. In so deciding, he relied on Walling v. Belo Corp., 316 U. S. 624. We think he erred. As recently as May of this year, the Supreme Court, in a unanimous opinion by Chief, Justice Vinson-confirming what had been said previously by this Court and by several other inferior courts -decided that the Belo case doctrine must be limited to agreements which contain a "provision for a guaranteed weekly wage with a stipulation of an hourly rate," and that other types of agreement, whether or not the result of collective bargaining, cannot, by their terms, determine what is the "regular rate" named in the Act. That "regular rate," said the Court, is an "actual fact." See 129 Madison Avenue Company (May 5, 1947), citing Walling v. v. Asselta. U. S. . Youngerman Reynolds Hardwood Co., 325 U. S. 419, 424. See also Walling v. Helmerich & Payne, 323 U. S. 37.

In the instant case, the "actual fact" concerning the "regular rate" appears in the findings of the trial judge which are supported by the evidence and which we understand the defendants do not dispute. In an Appendix to this opinion, we have set forth

pertinent portions of those findings.

Because government counsel, appearing for the defendants, have earnestly asserted the grave precedential importance of these appeals, and because of our respect for the able trial judge, we have considered his opinion with unusual care. None of us, however, is able to agree with that opinion. We conclude that the judgments, insofar as they are adverse to the plaintiffs, must be reversed.

Faced with substantially similar collective bargaining agreements and with facts in many respects the same, the Seventh Circuit in 1944 reached a conclusion like ours, as to longshoremen in the Great Lakes area; see Cabunac v. National Terminals Corp., 139 F. (2d) 953 (affirming the able opinion of Judge Duffy, sub

These are suppositious examples, but they illustrate, in simple form, what actually occurred.

As a consequence, one of his conclusions of Law reads: "The straight time hourly rate set forth in each " collective Agreement " constituted the regular rate at which plaintiffs were employed " constituted the regular rate at which plaintiffs were employed " constituted the regular rate at which plaintiffs were employed " constituted the regular rate at which plaintiffs were employed " consolidated the regular rate at which plaintiffs were employed " consolidated the regular rate at which plaintiffs were consolidated to the regular rate at which plaintiffs were the solid that given are counsel were the sole counsel for defendants here because the United States will ultimately pay any judgment against defendants, due to war-time "cost-plus" contracts between the United States and the defendants.

nom, International Longshoremen's Association v. National Terminals Corp., 50 F. Supp. 26). Judge Cooper, a few months ago, also reached this conclusion as to longshoremen working in Puerto Rico, in a case in which, as here, government counsel represented the employer and apparently advanced the very arguments advanced here. See Ferren v. Waterman S. S. Corp., 70 Fed. Supp. 1.

We cannot agree with the argument that our conclusion is unsound because it may require separate computations for each week at rates which may vary from week to week. In Overnight Motor Transport Co. v. Missel, 316 U.S. 572, 580, the Court said that compensation capable of reduction to an hourly basis by application of a uniform principle is "regular in the statutory sense, inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of bours worked." We take this statement as meaning that the statutory element of regularity is met where a single principle or

rule is uniformly applied in order to obtain the rate.

We think that the administrative interpretations suggest no conclusion different from ours. The one conceivable exception has to do with Sunday and holiday work. In a letter of May 14, 1943, discussing the Cleveland Stevedore Co., the Administrator said that "overtime compensation for Sunday or holiday may be credited toward overtime due under the Act," because "it can be regarded as time outside the employee's normal working hours"; but we must also consider the following: (1) The day after that letter of May 14, 1943, was written, Judge Duffy held the contrary; see International Longshoremen's Association v. National Terminal Corp., 50 F. Supp. 26, affirmed in 139 F. (2d) 853 (C. C. A. 7). (2) In an opinion published in the Wage & Hour Manual, 1944-45 Cum. Ed. page 227, the Assistant Solicitor referred to a previous ruling, in the Administrator's Interpretative Bulletin No. 4, that an employer might consider "as overtime compensation only if the "hours compensated for" were hours worked outside the normal or regular working hours"; the

The trial judge, speaking of the difficulty of ascertaining the amounts due if once you cut loose from the anchor of the agreement," said, "an employer's compensation would vary depending upon whether he worked for one employer or more than one, in the course of a single week"; 69 F. Supp. at 960. But see, on this very point, Walling v. Twyeffort, Inc., 158 F. (2d) 944, 947 (C. C. A. 2) as to employment during the same week of a single employee by several different employers.

Indeed, they support plaintiffs' contentions. Thus paragraph 69 of Interpretative Bulletin No. 4 says that "in determining whether he has met the overtime requirements of section 7 the employer may properly consider as arertime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as compensation for overtime work—that is, for hours worked outside the normal of regular working hours—regardless of whether he is required, to pay such compensation by a vision or other agreement." (The italics are as in the original.)

Perhaps because of the government's figurated interest in these cases, the Administrator on these appeals did not follow his frequent practice of filing (with our permission) a brief amicus, discussing his interpretations.

opinion said that such extra compensation might be considered overtime compensation only if the "hours compensated for were "hours not normally worked by the employees" giving as an example "work on Sundays, holidays, or at a time of day when the employee does not normally work"; the opinion, however, went on to explain that "hours worked on Sundays and holidays are generally outside the 'normal or regular working hours.'" In the instant cases, on the facts disclosed in the findings, the hours worked on Sunday afternoons, Sundays and holidays were surely not "outside the normal or regular working hours."

It is suggested that, if the contractual "straight time" rate is not the "regular rate," then that rate for any employee in any week must be ascertained by averaging the rates paid for the first forty hours of work in that week. But in Walling v. Halliburton Oil Well Cementing Co., U. S. (April 14, 1947), the Court stated that "in Overnight Motor Co. v. Missel, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked." See also Ferren y. Waterman S. S. Co., supra; cf. Walling V. Schollhorn,

54 F. Supp. 1022.

The Administrator's Press Release 1913 stated that theretofore, where an employee received more than one rate during a
workweek, the Administrator had ruled that the employer must
pay the employee an "overtime rate of one and one-half his average hourly earnings for the entire week, computed by dividing
the weekly earnings at both rates by the total number of hours
worked in the week," but that thereafter an employer would have
an option, in the alternative, to compute the overtime rate at one
and one-half times the rate at which the employee worked during the hours in excess of forty. However, this Release was later
qualified by Press Release 1913 A, which stated, "In order to take
advantage of this [revised] rule, the records of the employer must
show which method of computing overtime compensation he had
determined to follow." Nothing in the evidence here indicates
that either defendant so kept its records.

Counsel for plaintiffs are allowed \$2,000.00 for their services

on these appeals.9

Reversed and remanded for determination of the amounts due plaintiffs in accordance with this opinion.

⁸ See the Appendia to this opinion, especially Findings 19, 20, 34, 35 and 46. See also 69 F. Supp. at 960, note 2.

⁹ Of course, the district court will, in addition, make allowances for the services, in that court.

Findings of Fact No. 14: In the longshore industry in the Port of New York there are no regular or usual hours of work. Employment is highly casual in character, more so than employment in any other major industry. This condition is primarily the product of the uncertainties of maritime, shipping and weather conditions, the unpredictable character of ship and overland cargo arrivals and the use of the 'shape' as a hiring device, as defined in Finding No. 16. The casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique.

"No. 15: During the period in suit, and for many years prior thereto, longshoring in the Port of New York has had the following characteristics. With rare exceptions, longshoremen do not work regularly or continuously for any one stevedoring company, but shift from employer to employer and from pier to pier as casual workers, working when they want, and when and where work is available. There is no regular weekly or even daily, employment. Longshoremen may work for more than one employer in a single day, or during the same week. The total number of hours worked in any day or week varies widely. Irregularity of both daily and weekly hours is characteristic of the industry.

"No. 16: Employment of Longshoremen is wholly dependent upon the selection of men at one or another of the 'shapes' at the head of each pier where work is to be done. At three stated hours during the day, namely, at 7.55 a.m., 12.55 p. m. and 6.55 p. m., men seeking employment gather in a group or semicircle, constituting the 'shape,' at the head of a pier where work is available. The foreman stevedore then selects from the 'shape' such men as he desires to hire to work until 'knocked off,' that is, told to quit. The selection of a man from the shape carries with it no obligation on the part of the employer concerning any specified length of employment, except for work requirements of the Collective Agreement relating to minimum hours under specified conditions. The duration of employment depends entirely upon the determination of the stevedore or the steamship company. Where longshoremen work during 'straight time' hours, it is customary for the employer to defer until about 4.30 p. m. his decision as to whether the men shall do work after 5 p. m. If it seems likely. that night work will be required, the employer may definitely engage the men, or he may order them to shape at 6.55 p.m. If the men are directed to shape at 6.55 p. m., and the employer then decides not to work that night, because of weather conditions or other

circumstances relating to the arrival or handling of cargo, he is at liberty not to hire any man at the 6.55 p. m. shape, and thereby he incurs no obligation for compensation. At times the men have been directed to shape up at hours other than the three specified

shape hours hereinabove mentioned.

"No. 17: When men have been selected individually at the shape, they are organized into gangs of about 20 men, in charge of a foreman, and put to work loading or unloading a ship. Where a gang has been accustomed to work as a group, it is assigned to a particular hatch or job. A gang may hold together for a few hours, or it may operate as a unit as long as there is work in the hatch or ship, which may be for less than a day or for more than a week. They may, and sometimes do, work as a group on frequent occasions for one employer, being employed regularly or steadily. The men are employed only when there is work to be done. At the end of a working period a gang may be told to 'knock off,' in which event the men would shape again at a later shaping hour, or on the next day, if they so desired, if work was available at the pier.

"No. 18: During the period in suit, the defendants in some instances adopted the practice of posting notices on bulletin boards of the arrival of ships, or of calling gangs, working customarily together, by a prior notice posted at the pier or by telephonic communication from the stevedoring foreman to the gang leader or hatch boss, and from him, in turn, to the individual men. This practice, however, did not bring about a departure from the established custom that the men shape up at the customary times, regardless of whether they had been working at that pier

on the previous day or even earlier the same day.

"No. 19: The amount of work which may be available for longshoremen in the Port of New York, and the time of the day or the day of the week when such work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week, and season to

"No. 20: Under the terms of the Collective Agreement in effect during the period in suit, and under previous Collective Agreements in effect over a period of many years, the longshoremen in the Port of New York have been obligated to work any night of the week or on Sundays, holidays or Saturday afternoons, when

directed, with special limitations on Saturday nights.

"No. 22: The stevedoring business in the Port of New York prior to World War II, had the following characteristics: About seven or eight stevedoring companies worked for one steamship company each, wherea about 60 other stevedoring companies, known as contracting stevedores, worked for a number of steamship lines. Before a ship docked in this port, the stevedores knew the vesser's definite or approximate date of departure and also the type of cargo to be discharged or loaded. Thereupon, they made a determination concerning the best way of handling the cargo at the lowest possible cost. Tentative plans for the handling of the cargo were readjusted from time to time on account of delayed arrival, necessity for repairs, delay in arrival of outgoing freight, weather conditions and other factors.

"Stevedoring companies never worked any more 'overtime' than was necessary, because it was more economical for the steamship company, and more profitable to the stevedores, to work during 'straight time' hours. It was the common practice for stevedoring companies to use auxiliary equipment, and to work the largest number of day gangs within the vessels' limitations of space and equipment. Permission to work 'overtime' had to be obtained by the stevedoring company from the steamship company. The decision whether to work 'overtime' was controlled by the necessity of meeting scheduled sailing dates in the case of passenger liners, and otherwise by financial considerations turning on whether the over-all cost of a later departure exceeded the cost of 'overtime.' The contract between stevedoring companies and steamship lines usually provided that the former would be paid on a tonnage basis, plus the actual cost of 'overtime', including 'overtime' differentials, insurance and Social Security taxes. For the most part, the longshoremen preferred to work during the daytime rather than during the night. The amount of 'overtime' that the men worked depended to a considerable extent upon the stevedoring companies by whom they were employed.

"No. 25: The steamship companies in the Port of New York have preferred to confine the handling of cargo to 'straight time' hours to the greatest possible extent. They give permission to work 'overtime' when such work is unavoidable. The 50-percent over-riding charge for work done during 'overtime' hours is a deterrent because of the added cost and the intensity of the competition between American ships and ships of foreign registry.

"No. 26: Stevedoring companies try to avoid working 'overtime' hours. Their contracts are entered into on a commodity tonnage basis. When permission is granted to work 'overtime,' stevedores receive in addition to the commodity tonnage rate only the actual additional amounts paid out in wages, plus insurance and Social Security tax. 'Overtime' work is less efficient than work in 'straight time' hours. These factors contribute to the reduction of the stevedore's profits, if his employees are worked 'overtime.'

"No.-30: Night work, Sunday work, work on Saturday afternoons and on certain legal holidays, have been compensated at rates higher than the prevailing day rates in the longshore industry in the Port of New York at least as far back as 1887.

"No. 33: In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the Collective Agreement for the long-shoremen's industry in the Port of New York introduced, with reference to work at night, Saturday afternoons, Sandays, and Holidays, on general cargo, the terms 'overtime' and 'overtime which shall be paid for at the overtime rate.' The parties, nevertheless, from the passage of the Fair Labor Standards Act through the period in suit, made no actual-change in the general manner of compensating longshoremen as compared with that prevailing previously, except under the circumstances noted in Finding No. 43 (a).

"No. 34: During most of the period in suit the defendants required some longshore work practically around the clock, day in and day out, except Saturday nights. Defendant Huron employed some groups exclusively on night work. Defendant Bay Ridge assigned its gangs either to day or night work as shipping exigencies required, and its gangs frequently commingled day work with night work on different days in the same working week.

"No. 85: No stevedoring company worked exclusively from 8 a.m. to 5 p. m. and Saturday mornings. Even prior to World War II some stevedoring companies had fairly regular recourse

to some night work.

"No. 36: During the period in suit defendants endeavored to have longshoremen available for work in regular gangs which were called out by defendants to shape up as shipping exigencies required. Some of the plaintiffs normally sought employment at other piers only when they could not get work at the piers served by the defendants sued herein. Even when ordered out by defendants, however, the gangs were required to shape up in the customary manner and no man had assurance of employment or guarantee of its duration, except for the provisions of the Collective Agreements for minimum hours of pay under specified conditions of employment.

"No. 41: An examination of the employment record of each of the plaintiffs shows that their work followed no regular pattern. There were many weeks during which they were not employed by the defendants. They worked varying numbers of days in different weeks. The number of hours worked on the days when they did work varied greatly. Many weeks they worked less than 40 hours; other weeks more than 40 hours. They handled a variety of cargoes, and some of them worked at various times as

headers, gangwaymen or assistant foremen.

"No. 42: During the period in suit the defendants paid plaintiffs the 'straight' time hourly rate' for work performed during the

contract 'straight time' hours and the 'overtime hourly rate' for work performed during the contract 'overtime' hours, plus the customary differentials for work performed as headers, gangwaymen and assistant foremen. These rates were paid by the defendants regardless of whether plaintiffs worked more or less than 40 hours a week, with the single exception stated in Finding No. 43 (a).

"No. 43 (a) If, and only if, a longshoreman worked more than 40 hours between 8 a. m. and 12 noon, and 1 p.m. and 5 p. m. on Mondays to Fridays, inclusive, and between 8 a. m. and 12 noon on Saturday of that workweek, none of these days being a holiday, he was paid an additional sum for work on Saturday morning in excess of 40 hours—namely 62½ cents per hour, plus, when applicable, the differentials mentioned in Finding No. 11; however, he was not paid an additional 50 percent of the differentials."

"(b) A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being 'overtime' hours, was paid the 'overtime' hourly rate of \$1.87% an hour, for all

hours both within and beyond 40.

"(c) A longshoreman who worked on general cargo 40 hours or more during 'overtime' hours, and also worked on Saturday from 8 a. m. to 12 noon during the same workweek, received \$1.87\%, the 'overtime hourly rate,' for the 'overtime' hours, and \$1.25, the

straight time hourly rate, for the Saturday hours.

"(d) A longshoreman who worked on general cargo for eight hours on Monday, from 8 a. m. to 5 p. m., and ten 'overtime' hours during each of the following four days and also on Saturdays from 8 a. m. to noon, received compensation at the 'straight time' rate for Monday and Saturday, and the 'overtime' rate for the other hours.

"(e) A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the 'overtime' classification, was paid the 'overtime hourly rate' of \$1.87½

per hour.

"No. 44: During the period in suit, the plantiffs, if they so desired, worked Sundays and Holidays whenever work was available to them, just as any other day.

"No. 45: The 'hasic working day' and the 'basic working week' referred to in the Collective Agreement were not the working day

Finding 11 reads: "In addition to the wage scale provided for in the Collective Agreement, longshoremen, including the flainting, whenever assigned by stevedores, including the defendants, to perform a specified part of the work calling far additional responsibility, were said, by custom, additional compensation, called fleading differentials, as follows: 5 cents per hour for work as a header. (A header is a longshoremen who is in charge of a group of men, usually four, working in the hold of the ship); 5 cents per hour for work as a 'gangwayman.' (A gangwayman is a longshoremen who is in charge of a group of men, usually four, working on deck); and 15 cents per hour for working as an assistant foreman. These rates of additional payment were not increased when the employee worked in excess of 40 hours or during overtime Hours."

or working week normally, regularly or usually worked by

plaintiffs during the period in suit.

"Nos 46: During the period in suit, it was not unusual for the plaintiffs, in their employment by defendants, to start their work on a ship at night rather than by day, and it was not unusual to start their work on Saturday afternoon or Sunday."

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of June one thousand nine hundred and forty-seven.

Present: Hon, THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. JEROME N. FRANK, Circuit Judges.

JAMES AARON, ET AL., PLAINTIPFS-APPELLANTS

BAY RIDGE OPERATING CO., INC., DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District

of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for determination of the amounts due plaintiffs in accordance with the opinion of this court.

Furthermore ordered that counsel for plaintiffs be and hereby are allowed \$2,000.00 for their services on this and the accompanying appeal in Leo Blue, et al., v. Huron Stevedoring Corp.

It is further ordered that a Mandate issue to the said District

Court in accordance with this decree.

ALEXANDER M. BELL, Clerk.

United States Circuit Court of Appeals, Second Circuit

JAMES AABON, ET AL.

BAY RIDGE OPERATING CO., INC.

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JUDGMENT

United States Circuit Court of Appeals, Second Circuit ..

(Filed June 3, 1947)

ALEXANDER M. BELL, Clerk.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3d day of June one thousand nine hundred and forty-seven.

Present: Hon Thomas W. Swan, Hon. Augustus N. Hand,

Hon. JEROME N. FRANK, Circuit Judges.

LEO BLUE, ET AL., PLAINTIFFS-APPELLANTS

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District

of New York, and was argued by counsel.
On Consideration Whereof, it is now be

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for determination of the amounts due plaintiff in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, Clerk.

United States Circuit Court of Appeals, Second Circuit

LEO BLUE, ET AL.

HURON STEVEDORING CORP.

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JUDGMENT

United States Circuit Court of Appeals, Second Circuit
(Filed June 3, 1947)

ALEXANDER M. BELL, Clerk.

United States Circuit Court of Appeals for the Second Circuit

Civil 33-213

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS-CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, AND NATHANIEL TOLBERT, PLAINTIFFS-APPELLANTS

BAY RIDGE OPERATING Co., DEFENDANT-APPELLEE
Civil 33-212

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEET-WOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, AND WHITFIELD TOPPIN, PLAINTIPPS-APPELLANTS

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

Petition for rehearing and to shape mandate or, in the alternative, for a stay of mandate

I

The defendant-appellee respectfully petitions that the Court grant it a rehearing in each of the above entitled appeals. As grounds for this request the defendant-appellee respectfully alleges that the Circuit Court erred:

(a) In holding that the decision of the District Court was based solely on the case of Walling v. Belo Corp., 316 U. S. 624, and that that decision is inapplicable on the ground that the Supreme Court, in the case of Walling v. Halliburton Oil Well Cementing Co.,

U.S. (April 14, 1947), limited the force and effect of the Belo case to agreements which contain a provision for a guaranteed weekly wage with a stipulation of an hourly rate.

(b) In holding that the cases of Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, and Walling v. Helmerich and Payne, 323 U. S. 37, establish a doctrine that "regular rate", within the meaning of those words in Section 7 of the Fair Labor Standards Act, is to be determined solely upon the basis of the amounts of money actually received by an employee during a particular workweek.

(c) In failing to recognize the applicability to this case of the holdings of the Supreme Court that "regular rate" is the amount actually received exclusive of overtime. See Walling v. Harinschfeger Corp., 325 U. S. 427, 430; Walling v. Youngerman-Reynolds Hardwood Corp., 325 U. S. 419, 424; United States v. Rosenwasser, 323 U. S. 360, 363.

(d) In failing to give due weight to the provisions of the collective bargaining agreements pursuant to which the plaintiffs were employed and paid, and in deciding that their contractual establishment of a basic or regular rate and overtime rates is legally ineffective.

(e) In citing as supporting authority the case of Cabunac v. National Terminals Corp., 139 F. (2d) 953, which arose under a collective bargaining agreement and under employment and payment practices completely dissimilar to those in these cases.

(f) In citing as supporting authority the case of Ferrer v. Waterman S. S. Corp., 70 F. Supp. 1; the trial court in that case having decided that the terms of the collective bargaining agreement there, involved were controlling upon it, and having based its decision upon an erroneous interpretation of the contract.

(g) In holding that the Wage and Hour Administrator's Interpretative Bulletin No. 4 does not support the defendant's

position.

(h) In holding that there can be no true overtime in an industry in which irregular hours are worked, notwithstanding the fact that there has long existed in the industry a bona fide contractual arrangement, under which there is established a normal or basic workday of 8 hours and a normal or basic workweek of approximately 40 hours with time-and-a-half pay for all work performed outside the basic day or in excess of the weekly maximum and notwithstanding the fact that the practice under said contract, since the enactment of the Fair Labor Standards Act, has

been to confine the work as closely as possible to the 8-hour basic

day and the weekly maximum fixed by the statute.

(i) In failing to decide how true overtime may be identified. and the relationship between payments of true overtime and the obligation of employers under Section 7 (a) of the Fair Labor Standards Act.

The argument in this Court occurred on May 9, 1947. The Portal-to-Portal Act of 1947 became effective on May 14, 1947. If this petition for rehearing is denied, or if following rehearing the Court adheres to its present decision, the defendant respectfully petitions that the mandate to the District Court direct it to allow the defendant to amend its answer for the purpose of pleading defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and of presenting evidence in support of such amended answers.

With respect to the propriety of this request, see the appended copy of the orders of the Supreme Court of the United States, dated June 16, 1947, in Alaska Juneau Gold Mining Co. v. Robertson, October Term 1946, No. 836; and 149 Madison Avenue Corporation v. Asselta, October Term 1946, No. 497. See also Carpenter v. Wabash Railway Co., 309 U. S.-23, 26-27; American Foundries v. Tri-City Council, 257 U.S. 184, 201; Watts, Watts & Co. v. Unione Austriaca, 248 U. S. 9, 21.

If the foregoing petitions are denied, the defendant moves that . the Court stays its mandate to the District Court in each of the above-named appeals, inasmuch as the defendant-appellee intends in such event to apply for a writ of certiorari to the Supreme Court of the United States.

Dated: New York, N. Y., June 17, 1947.

JOHN F. X. McGOHEY. United States Attorney,

PEYTON FORD. Assistant Attorney General.

J. FRANCIS HATDEN. Special Assistant to the Attorney General,

MARVIN C. TAYLOR, Special Attorney, Department of Justice,

MARY L. SCHLEIFER. Labor Law Counsel, Maritime Commission, Attorneys for Defendant-Appelles.

Certificate of Counsel

The undersigned, of counsel for the defendant, hereby certifies that the foregoing petitions are presented in good faith and not for purposes of delay.

MARVIN C. TAYLOR.

APPENDIX

Orders entered by the Supreme Court of the United States on June 16, 1947.

Alaska Juneau Gold Mining Co. v. Robertson, October Term

1946, No. 836:

Per ouriam "The petition for rehearing is granted. The order entered May 12, 1947, denying certiorari, is vacated and the petition for writ of certiorari is granted limited to the question presented by the petition for rehearing as to the effect of the Portalto-Portal Act of 1947, approved May 14, 1947.

"The judgment of reversal of the Circuit Court of Appeals is modified so as to provide that on demand to the District Court that court shall have authority to consider any matters presented

to it under the Portal-to-Portal Act of 1947."

149 Madison Avenue Corporation v. Asselta, October Term 1946, No. 497:

On consideration of the motion of counsel for the petitioner · to modify the judgment of this Court in this case, it is ordered that the judgment of affirmance entered herein on May 5, 1947, be modified so as to provide that the judgment of the Circuit Court of Appeals is affirmed and the cause is remanded to the District Court with authority in that court to consider any matters presented to it under the Portal-to-Portal Act of 1947, approved May 14, 1947."

United States Circuit Court of Appeals, for the Second Circuit

JAMES AARON, ET AL., PLAINTIFFS-APPELLANTS

BAY RIDGE OPERATING Co., INC., DEFENDANT-APPELLEE

LEO BLUE, ET AL., PLAINTIFFS-APPELLANTS

HURON STEVEDORING CORP., DEFENDANT-APPELLEE

Before: Swan, Augustus N. Hand, and Frank, Circuit Judges.

On Petition for Rehearing

John F. X. McGohey, Peyton Ford, J. Francis Hayden, Marvin C. Taylor and Mary L. Schleifer, for defendant-appellee.

Per Curiam:

The pettiion for rehearing is denied. Our decision remanding the suits should be interpreted to permit the district court to consider any matters presented to it under the Portal-to-Portal Act of 1947. We do not now, however, determine the scope or validity of any portions of that Act, since those matters have not been argued on these appeals.

T. W. S. A. N. H. J. N. F.

Dated June 18, 1947. Filed June 24, 1947.

United States Circuit Court of Appeals, Second Circuit

(Filed June 24, 1947)

ALEXANDER M. BELL, Clerk.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the city of New York, on the 24th day of June, one thousand nine hundred and forty-seven

Present: Hon. Thomas W. Swin, Hon. Augustus N. Hand,

Hon, JEROME N. FRANK, Circuit Judges.

JAMES AARON; ET AL, PLAINTIFFS-APPELLANTS

BAY RIDGE OPERATING Co., INC., DEFENDANT-APPELLEE

LEO BLUE, ET AL., PLAINTIPPS-APPELLANTS

HURON STEVEDORING CORP., DEPENDANT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the defendant-appellee.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

ALEXANDER M. BELL, Clerk.

United States Circuit Court of Appeals, Second Circuit

JAMES AARON, ET AL.

BAY RIDGE OPERATING Co., INC.

LEO BLUE, ET AL.

HURON STEVEDORING CORP.

ORDER

United States Circuit Court of Appeals, Second Circuit

(Filed June 24, 1947)

ALEXANDER M. BELL, Clerk.

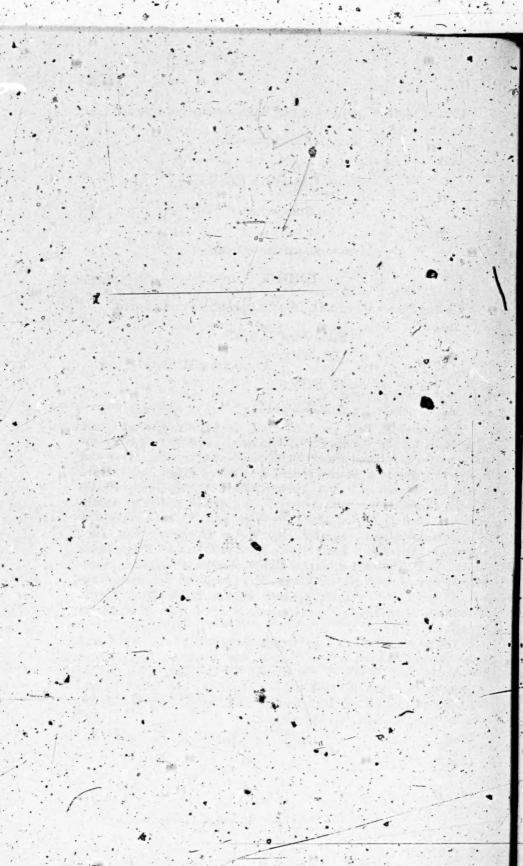
United States of America, Southern District of New York:

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 685, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of James Aaron, Albert Alston, James Philip Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel Tolbert, Plaintiffs-Appellants, against Bay Ridge Operating Co., Inc., Defendant-Appellee. Leo Blue, Nathaniel Dixon, Christian Elliott, Tony Fleetwood, James Fuller, Joseph J. Johnson, Sherman McGee, Joseph Short, Alonzo E. Steele, and Whitfield Toppin, Plaintiffs-Appellants, against Huron Stevedoring Corp., Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court, to be hereunto affixed, at the City of New York, in the Southerns District of New York, in the Second Circuit, this 18th day of August in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the said United States.

the one hundred and seventy-second.

[SEAL] (S) ALEXANDER M. BEIL, Clerk.



Supreme Court of the United States

No. 366, October Term, 1947

Order allowing certionari.

Filed November 10, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

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Nos. 366-367

In the Supreme Court of the United States

OCTOBER TERM, 1947

BAY RIDGE OPERATING Co., INC., PETITIONER

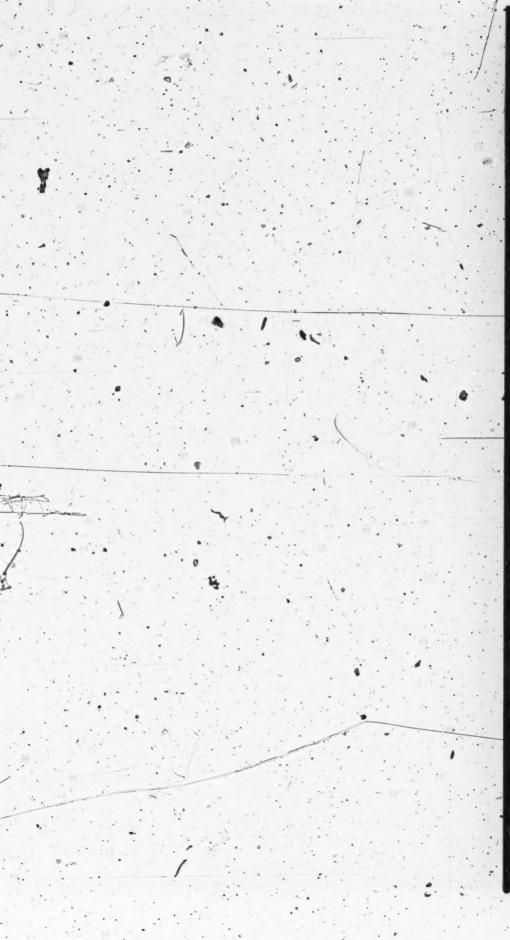
James Aabon, Albert Alston, James Philip Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens, and Nathaniel Tolbert

HUBON STEVEDORING CORP., PETITIONER

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT,
TONY FLEETWOOD, JAMES FULLER, JOSEPH J.
JOHNSON, SHERMAN MCGEE, JOSEPH SHORT,
ALONZO E. STEELE, AND WHITFIELD TOPPIN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT



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No. 366

BAY RIDGE OPERATING CO., INC., PETITIONER

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No. 367

HUBON STEVEDORING CORP., PETITIONER

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Bay Ridge Operating. Co., Inc., and Huron Stevedoring Corp., prays that writs of certiorari issue to review the judgments entered in the above-entitled

¹ The Solicitor General is appearing on behalf of petitioners because, in accordance with wartime "cost plus" contracts entered into between the United States and petitioners, the United States will ultimately have to pay such judgments

peals for the Second Circuit reversing the judgments entered by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 5815 591) is reported at 69 F. Supp. 956. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 654-659) is ported at 162 F. 2d 665.

JUBISDICTION

The judgments of the Circuit Court of Appeals were entered on June 3, 1947 (R. 665-667). A petition for rehearing filed by petitioners (R. 667-670) was denied by an order of the court entered on June 24, 1647 (R. 671-672). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

From 1916 to date, industry-wide collective bargaining agreements covering the terms and conditions of employment in the New York longshore industry (1) have prescribed periods of

as may here be rendered against petitioners. During World War II, the operation of all ships was taken over by the United States and substantially all stevedoring was performed for the account of the Government (R. 603).

specifically scheduled hours on weekdays; 1 (2) have provided that all work within such scheduled hours was to be paid for at agreed hourly rates (herein referred to as "straight time" rates); and (3) have provided that all work outside such scheduled hours on weekdays and all work on Sundays and holidays was to be paid for at higher hourly rates which, with minor exceptions, were one and one-half times the rates applicable to work during the scheduled hours (herein referred to as "overtime" rates). Longshoremen worked within and without the "straight time" hours in varying proportions. The issue in these cases is what were the "regular rates" at which the longshoremen were employed, within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTES INVOLVED

Section 7 (a) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, § 7 (a), 52 Stat. 1063, 29 U.S. C. 207 (a)) provides, in part:

No employer shall * * employ any of his employees who is engaged in com-

The scheduled hours under the 1916 agreement were 7:00 a.m. to 12:00 m. and 1:00 p. m. to 6:00 p. m. on Mondays through Saturday, inclusive, making a 60-hour week. In 1917, the scheduled daily hours were reduced to nine, and the workweek reduced to 54 hours. In 1918, the eight-hour day and Saturday half-holiday were achieved, making a 44-hour week. This arrangement continued (except for a period of lessened union power between 1922 and 1927, when Saturday afternoon work was resumed for all or some months of the year) until 1946, when the full Saturday holiday and a resultant 40-hour week were established.

merce for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.

Section 16 (b) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, § 16 (b), 52 Stat. 1069, 29 U.S. C. 216 (b)) provides, in part:

Any employer who violates the provisions of section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

STATEMENT

These two suits were originally parts of actions brought on behalf of numerous longshoremen, named as plaintiffs, and "all employees and former employees of [petitioners] similarly situated," to enforce petitioners' alleged liability for overtime compensation under Section 7 (a) of the Fair Labor Standards Act (June 25, 1938, c. 676, § 7 (a), 52 Stat. 1063, 29 U. S. C. 207 (a)) for work performed by the "plaintiffs" as longshoremen in the Port of New York during the period

October 24, 1938, to October 4, 1945 (R. 6, 13).

By stipulations, the representative character of the actions was terminated, the claims of the twenty respondents were severed from the actions of the other plaintiffs and consolidated for purpose of immediate trial, and the claims of the other plaintiffs were left pending on the docket of the court, to be controlled by the "legal rules and principles established by "final disposition of the severed actions" (R. 2-3, 544-549, 592-593). It was also stipulated that respondents were engaged in commerce within the meaning of, and entitled to the benefits of, the Fair Labor Standards Act (R. 594).

The facts, fully set forth in the detailed findings of the trial judge (which, as the Circuit

The twenty claims selected for immediate trial were chosen, on an examination of certain of petitioners' employment records, as presenting, in one or another of the workweeks involved, what was thought to be every possible combination of work pattern-with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time" and contract "overtime" periods. Thus, the legal rules established in the selected actions would be translatable to all the other pending cases. The work patterns of the selected claimants were, however, not intended to be typical or representative of those of their fellow claimants or of the longshore industry; the patterns in the industry as a whole are established by the statistical studies prepared for and introduced by government counsel and whose accuracy is stipulated (R. 606-608; Defendant's Exhibits D, E, and J).

Court of Appeals noted, are supported by the evidence and are not disputed (R. 657)), may be summarized as follows:

Employment in the longshore industry in the Port of New York is highly casual in character (R. 598-600). The amount of work available depends on the number of ships in port and the length of their stay and varies from day to day. week to week, and season to season (R. 601). The time when the work is to be done is determined by the employers (R. 599-600). rare exceptions, longshoremen do not work regularly or continuously for any one company, but shift from employer to employer and from pier to pier, working when they want and when and where work is available (R. 599). At a pier where work is available, the men group themselves, normally at 7:55 a. m., 12:55 p. m., and 6:55 p. m., in a semicircle, or "shape," from which the hiring stevedore selects such men as he wants (R. 599). Selection from the "shape." however, carries with it no obligation (except for certain minimum work provisions of the collective bargaining agreements) as to how long the man selected will continue at work (R. 599-600). As a result of these characteristics, there are, as to individual longshoremen, no regularity as to hours of work, as to employment by particular stevedoring companies, or as to total flaily or weekly hours of employment (R. 598-601, 614).

Nevertheless, the longshoremen (R. 602, 604). their union (the International Longshoremen's Association) (R. 604), the stevedoring companies (R. 602, 603-604), and the steamship companies (R. 603) have all consistently sought to limit the work as much as possible to the basic working day, that is, the scheduled "straight time" weekday hours. The objective of the men and their union, in this regard, has been to achieve the normal 8-hour day, generally prevalent in this country (R. 604); of the stevedoring companies, to avoid the reduction in profit consequent upon "overtime" work (R. 603-604); and of the steamship companies, to eliminate the added cost which would aggravate the already intense competition between American ships and ships of foreign registry (R. 603). To accomplish this purpose, the men have not infrequently refused to work at night unless it was absolutely necessary to do so and, through their union, have imposed the time and one-half "overtime" rates for such extraordinary work, in order to make it so expensive that employers would avoid it whenever possible (R. 604, 605). The stevedoring companies, for their part, commonly, use auxiliary equipment and the largest number of day gangs within the vessel's limitations of space and equipment in ofder to concentrate the work & largely as possible into the daytime hours (R. 602). The steamship companies do not permit "overtime" to be 761912-47-2

worked except with their approval (R. 602); and in wartime, the permission of the Government was required (R. 603).

Thus, the 50 percent premium provided by contract for overtime work was "expressly designed to deter the penalized activity" (R. 590, 605, 612) and has proved to be an effective deterrent of "overtime" work and to be responsible for the high degree of concentration of longshore work in the Port of New York in the basic working day (R. 590, 612). It was neither a "method of increasing earnings" (R. 605), nor a "shift differential" to induce work in unattractive hours (R. 589-590, 605-606, 612). These facts are

The district court also found that "overtime" rates are to be distinguished from "shift differentials," which are premium payments for work in a second or third shift where more than one shift is worked and which are usually 5 or 10

The district court found that the historical development of the collective bargaining agreements in the longshore industry in the Port of New York has followed the prevailing pattern in organized American industry (R. 612). Prior to the Fair Labor Standards Act, the court found, the word "overtime" had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an indispensable element of the concept of "overtime," which was also understood to cover hours outside a specified clock pattern. The "overtime" rate was usually one and one-half times the "straight time" rate. The purpose of the demand of organized labor . in American industry for a penalty compensation for "overtime" was to discourage work beyond a certain number of hours a week and to discourage work during specified periods of the day. It was prompted by the laborer's desire for a snorter workday and was not generally intended as a method of increasing earnings (R. 604-605).

borne out by port-wide statistical studies (R. 606-608; Defendants' Exhibits D, E, and J), whose accuracy was stipulated by the parties and which show that, outside of the wartime period, from 75 to 80 percent of the work was performed during "straight time" hours; that from 73 to 86 percent of the work done during "overtime" periods was performed by men continuing to work after working "straight time" hours on the same day; and that only about 4 percent of all work was done by men who worked only at night. During the

cents an hour more than the rate for the first shift. "Shift differentials" are large enough to attract workers to work during what are regarded as less desirable hours of the day and yet an not so large as to inhibit employers from the use of multiple shifts, whereas "overtime" rates are so large that they will inhibit or discourage on employer from working his men beyond a specified number of hours or during specified hours of the day (R. 605-606).

The collective agreements in the longshore industry did not employ the word "overtime" for all hours outside the basic working day until 1938, but since 1918, both the union and the employers, during their negotiations, continually referred to such hours as "overtime" (R. 611).

The studies show the following division between "straight time" and "overtime" work in the Port of New York: During the period 1932 to 1937, of the total man-hours worked, 79.93 percent of the work was performed during "straight time" hours; 4.94 percent was performed off Saturday afternoons, Sundays, and holidays; and only 15.13 percent was performed between 5:00 p. m. and 8:00 a. m. on weekdays. In the tenmonth period between October 24, 1938, the effective date of the Fair Labop Standards Act, and August 31, 1939, shortly before the outbreak of the war, 75.03 percent of the work was performed during "straight time" hours; 7.08 percent on Saturdays, Sundays, and holidays; and 17.89 percent-between 5:00 p. m. and 8:00 a. m. on weekdays. During the last full year of war experience—namely, the last three quarters of

abnormal war period, the proportion of overtime and of persons working wholly or materially during overtime hours substantially increased, but since the end of hostilities, the business in the Port of New York has largely reverted to peacetime patterns (R. 603).

The employment records of the individual respondents, employed during 1944 and 1945, show that their work followed no regular patterns (R. 614). There were many weeks during which they were not employed by petitioners (Id.). They worked varying numbers of days in different weeks, and the number of hours on the days worked varied greatly (Id). All performed substantial portions of their work during "overtime" hours, and some of them did all of their work during such hours. (See table opposite R. 612.) During many weeks, they worked less than 40 hours; whereas in other weeks, they worked more than 40 hours for the same employers (R. 614).

¹⁹⁴⁴ and the first quarter of 1945—the percentages, respectively, were 54.5, 20.5, and 25.0. Of the total overtime work performed between 5:00 p. m. and 8:00 a. m. on weekdays during the 1932–1937 period, 86.8 percent was performed by men who had held over, for periods of varying length, into the evening or night hours after having worked during the day, and only 13.2 percent by men who had not begun work until after 5:00 p. m. During the ten-month period noted above, the percentages, respectively, were 76.71 and 23.29. During the war period, they were, respectively, 55.5 and 44.5 percent. Expressed in terms of percentage of total manhours worked during each of the periods studied, the work done between 5:00 p. m. and 8:00 a. m. on weekdays by men who had begun work after 5:00 p. m. was 2.57, 4.17, and 11.1° percent in each of the three periods, respectively.

In accordance with the general arrangements for payment of longshoremen in the Port of New York, petitioners paid respondents the contractual "straight time" hourly rates for work performed during the specified "straight time" clock hours and the contractual "overtime" hourly rates for work performed during all other weekday hours and on Sundays and holidays (plus customary differentials for work performed in special capacities), regardless of whether respondents had worked more or less than a total of 8 hours in any one day or of 40 hours during the week; the one exception being that Saturday morning work, though "straight time" under the terms of the contract, was paid for at the "overtime" rate to the extent that such Saturday work exceeded 40 "straight time" hours in the workweek (R. 614).

On these findings, the district court concluded, as a matter of law, that the "straight time" hourly rates set forth in the collective bargaining agreements constituted the "regular rates" at which respondents were employed and that petitioners had complied with the requirements of Section 7 of the Fair Labor Standards Act, except in certain minor respects (R. 617). In so

The court held that petitioners had improperly failed to compensate some of the respondents for overtime in work-weeks in which some of their work was performed in special capacities or on penalty cargoes and with respect to some work performed by three respondents on Saturday mornings in excess of a 40-hour week (R. 617). To that extent, the judgments rendered in accordance with these holdings (R. 619-622) are not here in issue.

concluding the court deemed it appropriate to attribute substantial, if not controlling, significance to the provisions of those agreements in view of its findings: (1) that they did not establish "an artificial rearrangement of pre-F. L. S. A. rates of compensation in order to avoid additional compensation payable under that Act" (R. 588); (2) that, on the contrary, they were "the product of long history, collective bargaining, and an honesteffort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589); (3) that the legitimate objectives of the agreements were "decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation" (R. 588); (4) that the higher contractual "overtime" rates were not "shift differentials," but rather true overtime rates "designed to curtail, and [which] measurably succeeded in curtailing, excessive and abnormal hours" (R. 590); and (5) that the acceptance of respondents' contentions "would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false patenses and probably strain the resources of a substantial portion of American industry." (R. 586).

The court below disagreed. It held that agree ments other than the type involved in Walling v. Belo Corp., 316 U. S. 624, "whether or not the result of collective bargaining, cannot, by their terms, determine what is the 'regular rate' named

in the Act" and cited, as authority for that statement, this Court's ruling in 149 Madison Avenue Corp. v. Asselta, 331 U. S. 199. Although it accepted as correct all the findings of the trial court, it drew inferences from them conflicting with those adduced by the trial judge and determined that the "regular rate" in the longshore industry was not the "straight time" rate established by the collective bargaining agreements, but rather the quotient arrived at by dividing the total pay of each longshoreman each week by the total number of hours worked by him during that week (R. 654-659).

A petition for rehearing and to shape the mandate, or in the alternative, for a stay of mandate, filed by petitioners (R. 667-670), was denied by the Circuit Court of Appeals (R. 670-671). In so ruling, the court directed that its decision remanding the suits to the district court "should be interpreted to permit the district court to consider any matters presented to it under the Portal-to-Portal Act of 1947," which had become effective on May 14, 1947 (R. 671).

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, under which respondents and other

longshoremen were employed by petitioners during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7 of the Fair Labor Standards Act of 1938.

- 2. In failing to hold that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit satisfied the requirements of Section 7 of the Fair Labor Standards Act of 1938, with respect to payment of overtime compensation.
- 3. In holding that the "straight time" hourly rates set forth in such collective bargaining agreements were not the "regular rates," within the meaning of Section 7 of the Fair Labor Standards Act of 1938, at which respondents and other longshoremen were employed by petitioners during the period in suit, and in holding that the findings of the trial judge support that conclusion.
- 4. In holding that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit failed to satisfy the requirements of Section 7 of the Fair Labor Standards Act of 1938 with respect to payment of overtime compensation, and in holding that the findings of the trial judge support that conclusion.

5. In holding that rates equivalent to one and one-half times the "straight time" rates established in such collective bargaining agreements could not be excluded in computing the "regular rates" under Section 7 of the Fair Labor Standards Act unless paid for work during "hours not normally worked," and in holding that the hours between 5:00 p. m. and 8:00 a. m. on weekdays, and on Saturday afternoons, Sundays, and holidays were hours normally worked, and in holding that the findings of the trial judge support those conclusions.

6. In holding that the "regular rate" at which each of the respondents was employed by petitioners during each of the weeks of his employment during the period in suit was the quotient determined by dividing the total pay of each respondent each week by the total number of hours worked by him during that week, and in holding that the findings of the trial judge support that conclusion.

REASONS FOR GRANTING THE WRIT

1. These cases present an issue which has not before been passed on by this Court. In our view, the answer provided by the court below is in error. But in any event, the great urgency of the issue and the necessity for its prompt and final determination by this Court cannot be questioned.

An early ruling by this Court is essential not only because of the great pecuniary liability to which the United States would be subjected under the decision below, but, also, because of the importance of determining for the future the status under the Fair Labor Standards Act of the contractual arrangement which has long prevailed in the longshore industry throughout the United States, and the public interest in the restoration of certainty and stability in the labor relations of the longshore industry and those other industries which have been affected by that decision.

II was taken over by the Government, and substantially all stevedoring during that period was performed for its account pursuant to "cost plus" contracts (R. 603). By these contracts, the United States is obligated to pay practically all such judgments as may be rendered against the stevedoring companies in the present suits and in the several hundred similar longshore suits now pending in the courts.' Before the announcement of the decision below, 118 suits similar to the present cases had been instituted on behalf of thousands of longshoremen. Since that time, approximately 100 new complaints, one of which has as many as 12,000 named plaintiffs, have been

The Portal-to-Portal Act (Public Law 49, 80th Cong., 1st sess.), may, to an extent now unascertainable, diminish the amount of damages which may be recoverable in these suits. See §§ 6, 9, 11. That statute, however, does not remove or resolve the problem, which is of great significance to the industrics affected for the future, whether the type of contract here involved is in conformance with Section 7 of the Fair Labor Standards Act.

filed. These hundreds of cases, which have arisen in five circuits, for the most part are lying dormant, awaiting action by this Court on these two suits.

An equally important consideration is that the decision below would disrupt the long-standing overtime compensation provisions in the longshore agreements and in numerous similar collective bargaining agreements in other industries, and may thus inspire costly labor unrest in a large sector of the nation's economy. Not only the longshore industry in the Port of New York is affected by the ruling below. Most ports of the United States, Hawaii, and Puerto Rico, have long been controlled by collective agreements which, though they may differ in some minor details, in essence establish work patterns similar to that here involved. And a nation-wide survey made by the Industrial Relations Branch of the Bureau of Labor Statistics covering 437 union agreements in effect on July 1, 1946, in 31 industries employing slightly over two million workers, discloses that contracts establishing work patterns similar to those involved in the longshore industry were then in effect in portions of the automobile, canning and preserving, cotton textile, men's clothing, nonferrous metal, smelting.

^{*} See, to the same effect as the decision below, Ferrer v. Waterman Steamship Co., 70 F. Supp. 1 (D. C. Puerto Rico), relating to the longshore agreements in Puerto Rico.

and refining, shipbuilding, tobacco, and trucking industries.

2. Review of the judgments below is necessary not only because of the importance of the issue involved but also because, in our view, the decision below is incorrect. The lower court's assimilation of the New York longshoremen's collective. bargaining agreements to contractual arrangements struck down in other cases previously before this Court seems wholly unwarranted. The arrangements for compensation here in issue differ radically from those in the split-day plan of compensation, held invalid in Walling v. Helmerich & Payne, 323 U. S. 37, and in the piecework guarantee schemes rejected in Walling v. Youngerman-Reynolds Hardwood Company, Inc., 325 U. S. 419, and Walling v. Harnischfeger Corp., 325 U. S. 427. To compute the "straight time" rates (prescribed in the longshore agreements, one need not resort to "ingenious mathematical manipulations" (Walling v. Helmerich & Payne, supra, at 41); neither are they computed "in a wholly unrealistic and artifical manner so as to negate the statutory purposes" (Ibid. at" 42); nor are they "completely unrelated to the payments a ally and normally received each week by the employees" (Walling v. Younger-

That the rule established by the decision below will, unless corrected, be applied to such other industries has already become evident. See Roland Electrical Co. v. Black, decided August 12, 1947 (C. C. A. 4). 7 WH Cases 167, pending on petition for certiorari on another issue sub nom. Black v. Roland Electrical Co., No. 340.

man-Reynolds Hardwood Company, Inc., supra, at 426). On the contrary, the collective bargaining agreements in the longshore industry are products of an honest effort to decasualize employment in the industry and to accomplish the very objectives of the Fair Labor Standards Act, that is, the confinement of the work as largely as the nature of the industry will permit, to an Mour day and a 40-hour week. The "straight time" rates fixed by the longshore contracts are set forth in simple dollar-and-cents terms, are designed realistically to compensate the employees fully and equally for all work performed during the basic working day, and bear a definite relation to the weekly compensation earned by such employees.

That the "overtime" rates established for work during periods other than the scheduled hours on weekdays are also specific, and that they may be paid for work performed prior to the expiration of the 40-hour workweek and also in weeks where less than 40 hours are worked, are not reasons for treating them as "regular rates" and rejecting the "straight time" rates as the "regular rates" for purposes of Section 7 of the Fair Labor Standards Act. The "overtime" rates agreed upon were, with minor exceptions, one and one-half times the "straight time" rates, the overriding level conventionally adopted by organized American industry and in federal and state legislation as a true deterrent overtime premium. These

"overtime" rates were fixed at that level at the insistence of the longshoremen's union and for the purpose, consonant with the Congressional purpose expressed in the Fair Labor Standards Act, to deter the employers from working their employees during periods other than the basic working day and work week (R. 598, 604, 608-609, 611, 612). It is undisputed that the stevedoring companies so understood the overtime premium-for a true overtime penalty-and that it did effectively serve to induce a concentration of work during the normal daytime hours (R. 590, 601, 602, 603-604, 612). In these circumstances, we submit that to treat the "overtime" rates as merely other "regular rates" is to pervert the intent of the parties clearly expressed in a binding contract and for no compelling reason apparent in the letter or design of the statute.

The decision below is likewise unsupportable on the assumption that the "overtime" premium was in effect a "shift differential." The trial judge's finding that it was not such a differential (R. 589-590) is clearly justified in light of his subsidiary findings, based on uncontradicted testimony: (1) that a shift differential "is an amount added to the normal rate of compensation which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts" (R. 605); (2) that the "overtime" rates in these cases "were designed to curtail, and measurably succeeded in

curtailing" work outside the scheduled hours on weekdays (N. 590); (3) that shift differentials are usually 5 or 10 cents per hour and seldom exceed 15 cents an hour, whereas overtime premiums are generally 50 percent of the normal rate (R. 606); and in light of the testimony that shift differentials never exist except when there are regularly established shifts of fixed duration (R. 332, 334, 356) which the evidence and statistics show was not the case in this industry.¹⁰

Nor is there any significance in the fact that some of respondents may have been employed solely or mainly during "overtime" periods. The port-wide statistical studies (R. 606-608; Defendants' Exhibits D, E, and J), whose accuracy was stipulated, clearly demonstrate the exceptional character of such cases and the relatively small proportion of the work performed by men who worked only at night. See n. 5, pp. 9-10, supra. Except for the war period, the predominant percentage of "overtime" work was performed by men who had held over into the evening and night hours after having worked during

^{**}Cabunac v. National Terminals Corporation, 139 F. 2d 853 (C. C. A. 7), relied on by the court below (R. 657-658), is distinguishable from the present suits on the ground that the difference between the so-called "straight time" rate and the "overtime" rate in that case was apparently only 10 cents per hour (ibid., at 854), and was intended as an inducement to accept employment at unattractive hours. I. L. A. v. National Terminals Corp., 50 F. Supp. 26, 29 (E. D. Wisc.). Furthermore, the issue as to whether the differential was a true overtime penalty, foremost here, was only a subsidiary question in the Cabunac case.

the basic working day. Moreover, even during the war period, the majority of the night workers were hold-overs from daytime work, and the concentration of work during the basic working day even during that period of emergency was 2.4 times the concentration of work during the remaining 16 hours of the day. The work done between 5:00 p. m. and 8:00 a. m. on weekdays by men who had begun work after 5:00 p. m. was no more than 4.17 percent of the total man hours worked during the periods prior to the ontbreak of the war, and even during the war years did not far exceed 11 percent. Thus, the "overtime" rate, designed as a deterrent against overtime work, accomplished its purpose. The "normal, nonovertime workweek?' (Walling v. Helmerich & Payne, 323 U. S. 37, 40) in the lor shore industry consequently is actually and really the week composed of the scheduled hours on weekdays prescribed by the contracts, and the "regular rates" are the actual "payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime," i. e., the con-"straight time" rates. tractual. Walling Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 424; Walling, v. Harnischfeger Corp., 325 U. S. 427, 430.

In these circumstances, there is no reason, which we can conceive, for ignoring the long-standing collective-bargaining agreements here involved, as the court below has done. Of course contracts which establish artificial rates and which are deStandards Act, are to be condemned. Overnight Motor Co. v. Missel, 316 U. S. 572; 149 Madison Avenue Corp. v. Asselta, 331 U. S. 199. But the longshore agreements are not such contracts. They have governed the longshore industry since 1916; they long antedate the Fair Labor Standards Act; and they seem to conform with every requirement of the Act. Congress did not intend that collective bargaining be thwarted so easily.

Even where overtime compensation arrangements postdated the Act and were astutely devised to retain prior rates of pay, this Court has upheld them as valid. Walling v. A. H. Belo Corp., 316 U. S. 624; Walling v. Hallibyrton Oil Well Cementing Co., 331 U. S. 17. As the Court said, in the Belo case (316 U. S. at 634-635):

The problem presented by this case is difficult-difficult because we are asked to "provide a rigid definition of "regular rate" when Congress has failed to provide one. * that which it was unwise for Congress to do, this Coart should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text * * *. Where the question is as close as this one, it is well to follow the Congressionaf lead afford the fullest possible scope agreements among the individuals who are actually affected.

Finally, the decision below places unrealistic emphasis on the work patterns in the longshore industry during the war period, when much work was done on the docks in hours other than the basic working day and when some men worked only during such "overtime" hours. The abnormal volume of such work was due to the exigencies of total warfare, and the governmental policy not only to encourage but to require overtime work. Thus, Executive Order 9301 (8 F. R. 1825, 29 U.S. C., Supp. IV, 207 note) established a minimum workweek of 48 hours for the duration of the war. For that period, in effect, the purpose of the Fair Labor Standards Act to limit overtime work was suspended and the country's policy and program was so reversed as to compel excessive overtime. It is a troublesome question then, of much consequence not only to the longshore industry but to all industries, whether the work patterns established during wartime, when overtime work was vigorously thrust upon labor and management by the Government, should control the determination of the "regular rates" for purposes of computing the compensation to be paid for such overtime in the succeeding years of peace. As Judge Rifkind suggests (R. 585-586), the rule established by the court below might well render unlawful the almost universal arrangements for evertime compensation in American industry under the wartime 48-hour week."

3. The Administrator of the Wage and Hour Division believes that proper consideration was given by the court below to his interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct.

The public pronouncements of the Administrator declare that overtime compensation for work outside the "normal or regular working hours," such as the usual Sunday or holiday work, may be credited toward overtime due, and not included in the "regular rate of pay." (See R. 658-659.) The court below concluded that in these cases the work performed outside of the "straight time" hours was "not 'outside the usual or regular working hours'" (R. 659)." It is suggested,

¹¹ It is noteworthy, too, that the decision below casts considerable doubt on the validity of the almost universal practice in organized American industry to treat Sunday and holiday work as overtime work and the higher rates payable for such work as true punitive overtime.

¹² Authoritative public interpretations of the Administrator are not explicit on this point and have furnished the basis for conflicting arguments as to the administrative position. See R. 658-659. A letter written by the Administrator in 1943 to the Cleveland Stevedore Co. states that the non-straight-time hours worked by longshoremen are to be included within the employees' hours (R. 559). A different position had seemingly been previously expressed in 1938 in a letter written to the Industrial Association of San Francisco by a regional attorney (R. 574-577).

however, that whether or not the overtime here is being performed outside normal or regular working hours may properly be determined only on the basis of the operations in the longshore industry as a whole during normal peacetime conditions, under which overtime work is kept to a minimum. The proportion of overtime work during peacetime—20 to 25%—is not sufficient to make such work, which the industry sought to avoid insofar as possible, regular or normal.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1947.





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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING Co., INC., PETITIONER

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, AND NATHANIEL TOL-BERT

No. 367

HURON STEVEDORING CORP., PETITIONER

LEO BLUE, NATHANIEL DIXON, CHRISTIAN EL-LIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE, AND WHITFIELD TOPPIN

ON WRITE OF CERTIORARI TO THE UNITED STATES CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 581-

¹ The Solicitor General is appearing for petitioners in these cases because, in accordance with wartime "cost plus" contracts entered into between the United States and petitioners,

591) is reported at 69 F. Supp. 956. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 654-659) is reported at 162 F. 2d 665.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 3, 1947 (R. 665-667). A petition for rehearing filed by petitioners (R. 667-670) was denied by an order of the court entered on June 24, 1947 (R. 671-672). The petition for writs of certiorari was filed on September 23, 1947, and was granted on November 10, 1947 (R. 673). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

From 1916 to date, industry-wide collective bargaining agreements covering the terms and conditions of employment in the New York longshore industry (1) have prescribed periods of specifically scheduled hours on weekdays; (2) have provided that all work within such scheduled hours was to be paid for at agreed hourly rates.

the United States would ultimately have to pay such judgments as may be rendered against petitioners. During World War II, the operation of all ships was taken over by the United States, and substantially all stevedoring was performed for the account of the Government (Fdg. 23, R. 603).

The scheduled hours under the 1916 agreement were 7:00 a. m. to 12:00 m. and 1:00 p. m. to 6:00 p. m. on Mondays through Saturdays, inclusive, making a 60-hour week. In 1917, the scheduled daily hours were reduced to nine, and the

(herein referred to as "straight time" rates); and
(3) have provided that all work outside such scheduled hours on weekdays and all work on Sundays and holidays was to be paid for at higher hourly rates which, with minor exceptions, were one and one-half times the rates applicable to work during the scheduled hours (herein referred to as "overtime" rates). Longshoremen worked within and without the "straight time" hours in varying proportions. The issue in these cases is what were the "regular rates" at which the long-shoremen were employed, within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTES INVOLVED

Section 7 (a) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, 52 Stat. 1063, 29 U. S. C. 207 (a)) provides, in part:

No employer shall * * * employ any of his employees who is engaged in commerce. * * * for a workweek longer than forty hours * * unless such employee receives compensation for his employment in excess of * * [forty hours] at a rate not less than one and one-

workweek reduced to 54 hours. In 1918, the eight-hour day and Saturday half-holiday were achieved, making a 44-hour week. This arrangement continued (except for a period of lessened union power between 1922 and 1927, when Saturday afternoon work was resumed for all or some months of the year) until 1946, when the full Saturday holiday and a resultant 40-hour week were established (Fdg. 37, R. 610-611; Defendants' Exhibit A).

half times the regular rate at which he is employed.

Section 16 (b) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S.-C. 216 (b)) provides, in part:

Any employer who violates the provisions of * * section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

STATEMENT

These two suits were originally parts of actions brought on behalf of numerous longshoremen, named therein as plaintiffs, and "all employees and former employees of [petitioners] similarly situated," to enforce petitioners' alleged liability for overtime compensation, under Section 7 (a) of the Fair Labor Standards Act (June 25, 1938, c. 676, 52 Stat. 1063, 29 U. S. C. 207 (a)), for work performed by the plaintiffs, and others similarly situated, as longshoremen in the Port of New York during the period October 24, 1938, to October 4, 1945 (R. 6, 13). By stipulations, the representative character of the actions was terminated, the claims of the twenty respondents were severed from the actions of the other plaintiffs and consolidated for purpose of immediate trial, and the claims of the other plaintiffs were left pending on the docket of the court, to be controlled by the "legal rules and principles established by * * final disposition of the severed actions" (R. 2-2a, 544-549, 592-593). It was also stipulated that respondents were engaged in commerce within the meaning of, and entitled to the benefits of, the Fair Labor Standards Act (R. 594).

The facts are fully set forth in the detailed findings of the trial judge. The court below accepted these findings as supported by the evidence and undisputed (R. 657). These findings may be summarized as follows:

The twenty claims selected for immediate trial were chosen as presenting, in one or another of the workweeks involved, what was thought to be every possible combination of work pattern—with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time" and contract "overtime" periods. The work patterns of the selected claimants were not intended to be and are not representative of the longshore industry. The patterns of the industry as a whole are disclosed, not by those of respondents, but, rather, by the statistical studies prepared for and introduced by government counsel, whose accuracy has either been stipulated by counsel or found by the trial court (Fdg. 29, R. 606–608; Defendants' Exhibits D-H and J).

^{&#}x27;These findings, concurred in by two courts, should, therefore, be accepted here without further examination. Allen v. Trust Company, 326 U. S. 630, 636; Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590, 605 (Jackson, J., concurring). The court below appended to its opinion those findings of the trial court which it deemed "pertinent." It omitted from its Appendix, however, many findings which we believe to be very pertinent. We urge the importance of the reading of the entire findings.

During the period in suit, longshoring in the Port of New York was governed by a collective bargaining agreement entered into between members of the New York Shipping Association and others, including petitioners, on the one hand, and the International Longshoremen's Association, of which respondents were members, on the other, (Fdg. 8, R. 594). This agreement established a "basic working day" of 8 hours and a "basic working week" of 44 hours, and the following wage-hour pattern for work in the port: specified hourly "straight time" rates were to be paid for "any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday;" and specified "overtime" rates (which, with minor exceptions, were one and one-half times the "straight time" rates) were paid for "All other

The twenty claims here involve work performed during the period October 1, 1943, to September 30, 1945, although the complaints from which they were severed were concerned with the more extended period October 24, 1938, to October 4, 1945. It is the former, shorter period which is referred to as the "period in suit" (Fdg. 4, R. 593).

The agreement provided eight separate rates for eight different classes of cargo to be handled. To each of these classes, a separate "straight time" rate and "overtime" rate were assigned. For the primary class, "general cargo," and for three other classes, the "overtime" rates were exactly one and one-half times the "straight" time rates; for the other four classes, they fell slightly short of time and one-half (Fdgs. 12, 9, R. 598, 595-597). The trial court held that these latter "overtime" rates, insofar as they were paid for work in excess of forty "straight time" hours in the week,

time, including meal hours and the Legal Holidays specified herein, [which] shall be considered overtime " " (Fdg. 9, R. 594-595). It was the custom in the industry also to pay the "overtime" rates for all hours worked on Saturday morning in excess of 40 "straight time", hours in any workweek (Fdg. 43 (a), R. 614) and to pay extra amounts called "heading differentials," in addition to the "straight time" and "overtime" rates, where longshoremen performed certain kinds of supervisory work (Fdg. 11, R. 597-598)."

Because of the uncertainties of maritime shipping and weather conditions, the unpredictable character of ship and overland cargo arrivals, and the use of the "shape" as a hiring device, employment in the longshore industry in the Port of New York is highly casual in character (Fdgs. 14-17, R. 598-600). The amount of work available depends on the number of ships in port and the length of their stay and varies from day to day,

did not satisfy the requirements of Section 7 (a) of the Fair Labor Standards Act to the extent that they fell below time and one-half (R. 591). Petitioners do not quarrel with that ruling, and it is not in issue here.

These heading differentials were added uniformly without any increase, though the supervisory work might have been performed in excess of 40 hours or during "overtime" periods (Fdg. 11, R. 598). The trial court held that failure to pay time and one-half the heading differentials for supervisory work in hours worked beyond the statutory 40-hour maximum was a violation of the Fair Labor Standards Act (R. 591). Again (cf. supra, note 6), petitioners do not question that ruling, and it is not in issue here.

week to week, and season to season (Fdg. 19, R. 601). The time when the work is to be done is determined by the employers (Fdg. 16, R. 599-600). With rare exceptions, longshoremen do not work regularly or continuously for any one company, but shift from employer to employer and from pier to pier, working when they want and, where work is available (Fdg. 15, R. 599). At a pier where work is available, the men group themselves, normally at 7:55 a m., 12:55 p. m., and 6:55 p. m., in a semicircle or "shape," from which the hiring stevedore selects such men as he wants (Fdg. 16, R. 599). Selection from the "shape," however, carries with it no obligation (except for certain minimum work provisions of the collective bargaining agreement) as to how long the man selected will continue at work (Fdg. 16, R. 599-600). As a result of these characteristics, there are, as to individual longshoremen, no regularity as to hours of work, as to employment by particular stevedoring companies, or as to total daily or weekly hours of employment (Fdgs. 14-19, 41, R. 598-601, 614).

Nevertheless, the longshoremen (Fdgs. 22, 27, R. 602, 604), their union (the International Longshoremen's Association) (Fdg. 27, R. 604), the stevedoring companies (Fdgs. 22, 26, R. 602, 603-604), and the steamship companies (Fdg. 25, R. 603) have all consistently sought to limit the work as much as possible to the basic working day,

that is, to the scheduled "straight time" weekday hours. The objective of the men and their union in this regard has been to achieve the normal 8-hour day, generally prevalent in the country (Fdg. 27, R. 604); of the stevedoring companies, to avoid the reduction in profit consequent upon "overtime" work (Fdg. 26, R. 603-604); and of the steamship companies, to eliminate the added cost which would aggravate the already intense competition between American ships and ships of foreign registry (Fdg. 25, R. 603). To accomplish this purpose, the men have not infrequently refused to work at night unless it was absolutely necessary to do so and, through their union, have imposed the time and one-half "overtime" rates for such extraordinary work, in order to make it so expensive that employers would avoid it except where it was impossible to do so (Fdgs. 27, 28 (c), R. 604, 605). The stevedoring companies, for their part, commonly use auxiliary equipment and the largest number of day gangs within the vessel's limitations of space and equipment in order to concentrate the work as largely as possible into the daytime hours (Fdg. 22, R. 602). The steamship companies do not permit "overtime" to be worked except with their approval (ibid.); and, in wartime, the permission of the Government was required (Fdg. 23, R. 603).

Higher rates have been paid in the longshore industry in New York for night work, Sunday work,

and work on Saturday afternoons and on certain legal holidays at least as far back as 1887; and from 1916, when the first agreement was made with the International Longshoremen's Association down through the period in suit, such premium rates have generally approximated one and one half times the rates for day work (Fdgs. 30, 31, R. 608-609). These 50 per cent. premiums estab lished by the contracts have been "expressly designed to deter the penalized activity" (R. 590; see Fdgs. 28 (c), 39, R. 605, 612) and have proved to be an effective deterrent of "overtime" work, responsible for the high degree of concentration of longshore work in the Port of New York into the basic-working day (R. 590; Fdg. 39, R. 612). The "overtime" premium rates are neither a "method of increasing earnings" (Fdg. 28 (c), R. 605), nor are they "shift differentials" to induce work in

distinguished from "shift differentials", which are premium payments for work in a second or third shift where more than

^{*}Although, until 1938, the collective agreements did not employ the word "overtime" to describe the hours worked outside the basic working day so far as "general cargo" was concerned, that term was almost continuously so employed in the contracts so far as "bulk cargo" was concerned (Fdgs. 31, 33, 37, R. 609, 611; Defendants' Exhibit A); and apparently there is no significance in the use of the term in one connection and not in the other. Moreover, since 1918, both the union and employer representatives, during their negotiations, continually referred to such extra-basic hours as "overtime," and the award rendered by the National Adjustment Commission in 1919 labelled the hours outside of the basic working day as "overtime" (Fdg. 37, R. 611).

The district court found that "overtime" rates are to be

unattractive hours (R. 589-590; Fdgs. 28 (d), (e), 39, R. 605-606, 612). Their efficacy as deterrents of "overtime" is borne out by port-wide statistical studies introduced into evidence by petitioners (Fdg. 29, R. 606-608; Defendants' Exhibits D. E, and J). The accuracy of the two studies made under the supervision of Professor Caleb A. Smith of Harvard University (Exhibits D and E) was stipulated by the parties; the third was found to

one shift is worked and which are usually 5 or 10 cents an hour more than the rate for the first shift. "Shift differentials" are large enough to attract workers to work during what are regarded as less desirable hours of the day and yet are not so large as to inhibit employers from the use of multiple shifts, whereas "overtime" rates are so large that they will inhibit or discourage an employer from working his men beyond a specified number of hours or during specified hours of the day (Fdgs. 28 (d), (e), R. 605-606).

The district court found also that the historical development of the collective bargaining agreements in the longshore industry in the Port of New York has followed the prevailing pattern in organized American industry (Fdg. 39, R. 612). Prior to the Fair Labor Standards Act, the word "overtime" had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity. however, was not an indispensable element of the concept of overtime, for it was also understood to cover hours outside a specified clock pattern. The overtime rate was usually one and one-half times the "straight time" rate. Organized labor in American industry demanded penalty compensation for overtime in order to discourage work beyond a certain number of hours a week and to discourage work during specified periods of the day. It was prompted by the laborer's desire for a shorter workday and was not generally intended as a method of increasing earnings (Fdgs. 28 (a)-(c), R. 604-605).

be accurate by the trial court (R. 27-30; Fdg. 29, R. 607-608). These studies show that, outside of the war years, from 75 to 80 per cent. of the work on the New York docks has been performed during "straight time" hours; that from 73 to 86 per cent. of the work done during "overtime" periods has been performed by men continuing to work after working "straight time" hours on the same day; and that only about 4 per cent. of all work has been done by men who worked only at night. During the abnormal war period, the

¹⁶ The significance of the data disclosed by these studies is discussed in the Argument, infra, pp. 39-48 passim. In summary, the studies show the following division between "straight time" and "overtime" work in the Port of New York: During the period 1932 to 1937, of the total man-hours worked, 79.93 per cent. of the work was performed during "straight time" hours; 4.94 per cent. was performed on Saturday afternoons, Sundays, and holidays; and only 15.13 per cent. was performed between 5:00 p. m. and 8:00 a. m. on weekdays. In the ten-month period between October 24, 1938, the effective date of the Fair Labor Standards Act, and August 31, 1939, shortly before the outbreak of the war, 75.03 per cent. of the work was performed during "straight time": hours; 7.08 per cent. on Saturdays, Sundays, and holidays; and 17.89 per cent. between 5:00 p. m. and 8:00 a. m. on weekdays. During the last full year of war experience-namely, the last three quarters of 1944 and the first quarter of 1945 the percentages, respectively, were 54.5, 20.5, and 25.0. Of the total overtime work performed between 5:00 p. m. and 8:00 a. m. on weekdays during the 1932-1937 period, 86.8 per cent. was performed by men who had held over, for periods of varying length, into the evening or night hours after having worked during the day, and only 13.2 per cent, by men who had not begun work until after 5:00 p. m. During the 1938-1939 period, the percentages, respectively, were 76.71 and

proportion of "overtime" and of persons working wholly or materially during "overtime" hours increased substantially, but since the end of actual hostilities, the business in the Port of New York has largely reverted to peace-time patterns (Fdgs. 23, 24, R. 603).

The employment records of the individual respondents, employed during 1943, 1944 and 1945, show that their work followed no regular pattern (Fdgs. 40 (and table), 41, R. 612-614). There were many weeks during which they were not employed by petitioners (ibid.). They worked varying numbers of days in different weeks, and the number of hours on the days worked varied greatly (ibid.). All performed substantial portions of their work during "overtime" hours, and some of them did all of their work during such hours (ibid). During many weeks, they worked less than 40 hours; whereas in other weeks, they worked more than 40 hours for the same employers (ibid.)

^{23.29.} During the 1944-1945 period, they were, respectively, 55.5 and 44.5 per cent. Expressed in terms of percentage of total man-hours worked during each of the periods studied, the work done between 5:00 p. m. and 8:00 a. m. on weekdays by men who had begun work after 5:00 p. m. was 2.57, 4.17, and 11.1 per cent. in each of the three periods, respectively.

During peacetime, work during "overtime" periods is more likely in the handling of passenger ships, which generally sail on fixed schedules, than it is on cargo vessels. During the war years, however, all vessels were scheduled into convoys, and a substantial amount of "overtime" work, therefore, became necessary (R. 64-66, 97, 134, 161, 163, 212).

In accordance with the general arrangements for payment of longshoremen in the Port of New York, petitioners paid respondents the contractual "straight time!" hourly rates for work performed during the specified "straight time" clock hours and the contractual "overtime" hourly rates. for work performed during all other weekday hours and on Sundays and holidays (plus customary differentials for work performed in special capacities), regardless of whether respondents had worked more or less than a total of 8 hours in any one day or of 40 hours during the week; the one exception being that Saturday morning work, though "straight time" under the terms of the contract, was paid for at the "overtime" rates to the extent that such Saturday work exceeded 40 "straight time" hours in the workweek (Fdgs. 42, 43 (a), R. 614).

On these findings, the district court concluded, as a matter of law, that the "straight time" hourly rates set forth in the collective bargaining agreement (plus heading differentials, when applicable) constituted the regular rates at which respondents were employed and that petitioners had complied with the requirements of Section 7 of the Fair Labor Standards Act, except in certain minor respects (R. 617).

The court below disagreed. It held that agreements other than the type involved in Walling v. Belo Corp., 316 U. S. 624, "whether or not the result of collective bargaining, cannot by their

terms; determine what is the 'regular rate' named in the Act" and cited, as authority for that statement, this Court's ruling in 149 Madison Avenue Corp. v. Asselta, 331 U. S. 199. Although it accepted as correct all the findings of the trial court, it apparently regarded as "pertinent" only those set forth in the Appendix to its opinion, omitting therefrom many on which the trial court had relied, as, for example, Findings 27-29, and 37-38. Drawing inferences conflicting with those deduced by the trial judge, it determined that the regular rates in the longshore industry were not the "straight time" rates established by the collective bargaining agreement, but rather, for each longshoreman, the quotient arrived at by dividing the total pay of . each longshoreman each week by the total number of hours worked by him during that week (R. 654-659). The court thereupon reversed the · judgment of the trial court and remanded the case for determination of the amounts due respondents in accordance with the appellate court's opinion (R. 666).

A petition for rehearing and to shape the mandate, or, in the alternative, for a stay of mandate, filed by petitioners (R. 667-670), was denied by the court below (R. 670-671). In so ruling, the court directed that its decision remanding the suits to the district court "should be interpreted to permit the district court to consider any matters presented to it under the Portal-to-Portal

Act of 1947," which had become effective on May 14, 1947 (R. 671).

A petition for writs of certiorari to the Circuit Court of Appeals was thereupon duly filed by petitioners and granted by this Court on November 10, 1947 (R. 673).

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Second Circuit erred:

- 1. In failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, under which respondents and other longshoremen were employed by petitioners during the period in suit, were the "regular rates" at which they were employed, within the meaning of Section 7 of the Fair Labor Standards Act of 1938.
- 2. In failing to hold that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit satisfied the requirements of Section 7 of the Fair Labor Standards Act of 1938, with respect to payment of overtime compensation.
- 3. In holding that the "straight time" hourly rates set forth in such collective bargaining agree-

ments were not the "regular rates," within the meaning of Section 7 of the Fair Labor Standards Act of 1938, at which respondents and other longshoremen were employed by petitioners during the period in suit, and in holding that the findings of the trial judge support that conclusion.

- 4. In holding that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit failed to satisfy the requirements of Section 7 of the Fair Labor Standards Act of 1938 with respect to payment of overtime compensation, and in holding that the findings of the trial judge support that conclusion.
- 5. In holding that rates equivalent to one and one-half times the "straight time" rates established in such collective bargaining agreements could not be excluded in computing the "regular rates" under Section 7 of the Fair Labor Standards Act unless paid for work during "hours not normally worked," and in holding that the hours between 5:00 p. m. and 8:00 a. m. on weekdays, and on Saturday afternoons, Sundays, and holidays were hours normally worked, and in holding that the findings of the trial judge support those conclusions.
- 6. In holding that the "regular rate" at which each of the respondents was employed by peti-

tioners during each of the weeks of his employment during the period in suit was the quotient determined by dividing the total pay of each respondent each week by the total number of hours worked by him during that week, and in holding that the findings of the trial judge support that conclusion.

SUMMARY OF ARGUMENT

T.

The letter of the collective bargaining agreement in effect during the period in suit, the intent of the parties who executed it, and the wage and hour practices prevalent on the docks all disclose that the "straight time" rates specified in the agreement were "the actual payments, exclusive of those paid for overtime, which the * [should] be agreed * parties paid during each workweek" (Walling v. Harnischfeger Corp., 325 U.S. 427, 430), that is, that they constituted the regular rates at which respondents were employed, within the meaning of Section 7 (a) of the Fair Labor Standards Act; and that the specified time and one-half "overtime" rates constituted true, punitive overtime compensation, which the stevedoring companies were entitled to credit against their statutory obligations.

A. The wage and hour provisions of the collective bargaining agreement specified hourly

"straight time" rates payable for "any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m. Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday," and "overtime" rates-generally established at levels one and onehalf their "straight time" counterparts-payable for "All other time;" the "overtime" rates were also paid for such Saturday morning work as was performed in excess of 40 "straight time" hours. The "overtime" premiums were designed not to induce work during the non-scheduled hours, but, rather, to deter the stevedoring companies from requiring such work to be done, and, thereby, to achieve a concentration of longshoring during the scheduled hours and the maximum possible measure of regularity in employment on the docks. The "overtime" premiums were, therefore, not shift differentials, and the "overtime" rates not merely regular rates for work during the non-scheduled periods; to the contrary, the "overtime" rates constituted true punitive overtime compensation.

B. This is evident not only from the letter and the intent of the collective agreement which established these "overtime" rates, but also from the fact that they inhibited overtime in the industry. Because of the premiums, there has been a marked preponderance of "straight time" hours over non-scheduled hours. While the ratio of overtime has increased during wartime, the ma-

jority of the total man-hours worked still consisted of "straight time" hours, and, in any event, the increase during wartime was a consequence of governmental policy itself. In such circumstances, the abnormal work-patterns of the war years should not be permitted to control the determination of this case. For substantially similar reasons, the employment records of the individual respondents are not controlling.

II.

The wage and hour arrangements in the longshore industry in the Port of New York during the period in suit were in full accord with the purposes and policies of the Fair Labor Standards Act and not in conflict with prior decisions of this Court.

A. Since t'e requirement of the collective bargaining agreement that time and one-half "overtime" rates be paid for work in the non-scheduled
hours deterred the stevedoring companies from
working men during such periods, it resulted in a
concentration of longshoring into the scheduled
"straight time" hours, a consequent reduction
in the hours of work, and the employment of more
men on each job. Longshoremen who were forced
to work overtime were compensated for that burden by the premium pay. Thus, the purpose and
policy of the Act to reduce working hours and
spread employment were achieved. The fortuitous
circumstance that some of the respondents worked

solely during non-scheduled hours and, consequently, might have received the same contractual. "overtime" rates for work in excess of 40 hours as they had for work within 40 hours detracts nothing from the deterrent effect of the "overtime" rates. The 50 per cent. overriding penalty operated to discourage work beyond 40 hours in the week as well as to discourage work beyond the scheduled daytime periods. If the deterrent effect was insufficient to have prevented the occurrence of such situations, that was a consequence, not of the character of the rates, but rather of the situation during wartime, when the influence of all penalty premiums in curtailing excessive hours paled in the light of the urgency of total warfare.

B. The wage and hour arrangements in the industry reflected an attempt to alleviate the casual employment conditions through the medium of collective bargaining. The collective bargaining agreement in the longshore industry, as the trial court found, was "the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589). The decision below, nevertheless, would substitute for the judgment of the contracting parties a rule arbitrarily imposed by the court. This, we submit, would do violence to the purpose and policy of the Fair Labor Standards Act to preserve the free-

dom and integrity of collective bargaining. The inevitable consequences of the rule below would be severely to restrict the scope of collective bargaining and to check the development of agreements establishing wages and hours more favorable to employees than the minimum standards established by the Fair Labor Standards Act. And this not only in the longshore industry but in numerous other industries where collective bargaining agreements are in effect which limit working days to specifically scheduled hours aggregating workweeks approximating the statutory maximum, by providing time and one-half overtime rates for work outside the scheduled hours.

C. The prior decisions of this Court do not require that the wage and hour arrangements in effect in the longshore industry in the Port of New York during the period in suit be set aside. The instant cases are in nowise similar, factually or. in principle, to the prior cases in which this Court has rejected wage and hour plans as violative of the Fair Labor Standards Act. Though likewise dissimilar, on a factual basis, to the Belo case, 316 U.S. 624, and the Halliburton case, 331 U. S. 17, the present proceedings, we submit, are much more readily assimilable in principle to those two cases. The flexibility which Congress intended should be employed in applying the statutory mandate to the "infinite variety of complicated industrial situations" (Kirschbaum Co. v. Walling, 316 U. S. 517, 523), marked by employment relationships "so various and unpredictable" (Walling v. A. H. Belo Corp., 316 U. S. 624, 634), should not be sacrificed to the rigidity urged by respondents and imposed by the decision below.

ARGUMENT

All longshore work in the Port of New York during the period in suit, including that performed by respondents, was paid for in accordance with the provisions of the collective bargaining agreement then in effect in the industry. Specified hourly "straight time" rates were paid for "any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday," and "overtime" rates, generally established at levels one and one-half their "straight time" counterparts, were paid for all other time, including meal hours, Saturday afternoons, Sundays, and the legal holidays. The "overtime" rates were also paid for such Saturday morning work as was performed in excess of 40 "straight time" hours (Fdgs. 9, 42, 43 (a), R. 595, 614). The issue here is whether such payments satisfied the requirement of Section 7 (a) of the Fair Labor Standards Act, supra, p. 3, that all work in excess of 40 hours in the workweek be compensated "at a rate not less than one and one-half times the regular rate" at which respondents were employed. The "crucial questions" are whether the contractual "straight

time" rates were, in fact, the regular rates of pay, within the statutory meaning of that term, and whether the contractual "overtime" rates constituted true overtime compensation which might be credited against the statutory obligation and which was adequate payment for hours in excess of 40 in the workweek. 149 Madison Avenue Corp. v. Asselta, 331 U. S. 199, 204.

Respondents urge, and the court below has held (R. 655-659), that the "straight time" rates were not, in "actual fact," the regular rates at which respondents were employed; that work cannot be classified as overtime unless performed "outside the normal or regular hours"; that in the present cases, the hours worked outside the scheduled "straight time'! hours and, indeed, even those worked on Saturday afternoons, Sundays, and holidays were not outside the normal or regular working hours; therefore, that the contractual "overtime" rates were not true overtime rates; and, finally, that the regular rate at which each of respondents was employed, as that term is used in the statute, could be ascertained only by dividing the total wages paid in each workweek to each individual by the hours worked by him in that week, the resultant variable quotient in each case constituting the regular rate of employment for each of the respondents. This ruling, the court believed compelled by "the pertinent decisions of the Supreme Court" (R. 655).

On the other hand, the district court concluded, after a comprehensive trial, that the contractual "straight time" rates (plus heading differentials, where applicable) did, in fact, constitute the regular rates at which respondents were employed and that petitioners had complied with the requirements of Section 7 of the Fair Labor Standards Act (except in certain minor respects which are not here in issue, supra, notes 6 and 7) (R. 617). In reaching that conclusion, the trial court attributed substantial significance to the provisions of the collective bargaining agreement in the industry, because, as it found: (1) those provisions did not establish "an artificial rearrangement of pre-F. L. S. A. rates of compensation in order to avoid additional compensation payable under that Act" (R. 588); (2) on the contrary, they were "the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589); (3) the legitimate objectives of the contractual provisions were "Decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation" (R. 588); (4) the higher contractual "overtime" rates were not "shift differentials", but, rather, true overtime rates "designed to curtail, and [which] measurably succeeded in curtailing, excessive and abnormal hours" (R. 590); (5) overtime rates are not limited to those paid for work in excess of a

stated number of straight time hours, but include, also, punitive rates applicable to work outside an agreed schedule of specific hours, within which the parties seek to concentrate their work (R. 604-605); and-(6) the acceptance of respondents' contentions "would create havor with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry" (R. 586).

Petitioners respectfully submit that the trial court's ruling is the correct one and that the decision below must, therefore, be reversed and the judgments of the district court reinstated.

T

THE CONTRACTUAL "STRAIGHT TIME" RATES WERE THE REGULAR RATES AT WHICH RESPONDENTS WERE EMPLOYED; AND THE CONTRACTUAL "OVERTIME" RATES WERE TRUE PUNITIVE OVERTIME

"Regular rate" is the "keystone" of Section 7 (a) of the Fair Labor Standards Act, supra, p. 3, and its proper determination in cases of this character, consequently, "of prime importance." Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 424. Unhappily, however, and "presumably "because the employment relationships to which the Act would apply were so various and unpredictable" (Walling v. A. H. Belo Corp., 316 U. S. 624, 634), Congress, in enacting the statute, failed to include a definition

of that vital term: nor did it authorize the courts or the administrator to supply the lack. Establishment of regular rate remained, as before, the function of the particular employer and employees concerned, whose intimate knowledge of the industry apparently was deemed ample justification for the assignment; and judicial inquiry into the matter, rather than calling for any pronouncement of a priori principles, consequently involves merely the "responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations." Kirschbaum Co. v. Walling, 316 U. S. 517, 523. As the Court has put it: "The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." Skidmore v. Swift & Co., 323 U. S. 134, 137; see Overnight Motor Co. v. Misser. 316 U. S. 572, 581.

In the instant cases, the wage and hour arrangements in the industry were truly reflected in the collective bargaining agreement in effect during the period in suit. Since that agreement was plainly bona fide (R. 588-589; Fdg. 37, R. 610-611), it is somewhat surprising, therefore, to find the court below so lightly brushing it aside (R. 657):

the Belo case doctrine must be limited to agreements which contain a "provision for a guaranteed weekly wage with a stipulation of an hourly rate," and other types of agreement, whether or not the result of collective bargaining, cannot, by their terms, determine what is the "regular rate" named in the Act. That "regular rate" is an "actual fact." [Italics supplied.]

The fact is, of course, that regular rate is not "named in the Act;" that it must be sought and can be found only in the wage-hour patterns in the industry; and that careful inquiry into the letter of the effective collective agreement and the intent of the parties who executed it is as significant to discovery of regular rate as examination of the manner in which the agreement was put into practice.

This is not to say, of course, that contracts which do not conform with actual practice, which are wholly unrealistic and artificial, or which negate the statutory purpose are not to be rejected. Clearly, such contracts cannot prevail in the face of the statutory mandate, and the Court has so held. Walling v. Helmerich & Payne, 323 U. S. 37; Walling v. Helmerich & Payne, 323 U. S. 37; Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419; Walling v. Helmischfeger Corp., 325 U. S. 427; Jewell Ridge Corp. v. Local, 325 U. S. 161; 149 Madieon Avenue Corp. v. Asselta, 331 U. S. 199. But the nere possibility of dissonance between contracts and practice or between contracts and practice or between contracts and statute does not justify disregarding them altogether. And

¹³ These cases are discussed in detailed, infra, pp. 61-69.

especially so, in cases such as these where, as will appear, the contractual provisions correspond fully with the realities of the employment agreement and do not clash with either the letter or purpose of the Fair Labor Standards Act.

The court below, therefore, had the clear duty carefully to consider the provisions of the collective bargaining agreement which governed long-shoring in the Port of New York during the period in suit and to declare those provisions fully in keeping with the requirements of the Fair Labor Standards Act, since they established basic rates above the statutory minima, were consistent with actual practice, and were motivated by the same purposes as the statute. The court, however, failed to accord the agreement any legal significance whatsoever (R. 657).

We proceed first to a consideration of the terms of the collective agreement and, then, of the actual practices prevailing in the industry.

A. It was the intent and letter of the collective bargaining agreement that the "straight time" rates constitute the regular rates and that the "overtime" rates constitute, true punitive overtime

The intent of the wage and hour provisions of the agreement is plain from the record. In light of conditions in the industry, they could have been designed for no purpose other than to achieve the quite legitimate ends of establishing a workweek restricted to the 8 daytime "straight

time" hours and of thereby achieving some measure of regularity on the docks.

We have already referred to the casualness of employment in New York longshoring, supra, pp. 7-8, and to the fact that the time when work tends to be done is affected by the arrival and departure of vessels and the arrival of the inland shipments destined for export. Since, however, an idle ship is a costly ship (MacElwee and Taylor, Wharf Management, Stevedoring and Storage, pp. 2, 3, 8), it would naturally be to the advantage of the shipping companies that the vessels' departure be speeded. This would require that cargoes be discharged and reloaded as soon as possible after arrival, and the shipping companies and 'the stevedoring companies, who are affiliated or under contract with them, would naturally seek, therefore, to start and complete the longshoring job at whatever hour of the day or week might meet their convenience. This economic urge, unless checked, would obviously result in working longshoremen for excessively long periods and both day and night until incoming ships are again under way. And there was a time, long ago, when a single hourly rate prevailing for both day and night work did result in a great deal of night work. Barnes, The Longshoremen (1915), p. 77. It was to avoid just, such anarchic employment practices that the union forced the adoption of the wage and hour

arrangements of the collective bargaining agreement (ibid.)

Longshoremen, like other workingmen, have never relished irregular work patterns, involving substantial night, Sunday, and holiday work. Since 1916, when their union began bargaining collectively with their employers, they have, therefore, consistently endeavored to achieve some regularity and to reduce the amount of such undesigable work, by scheduling basic working days and working weeks (whose narrowing limits have reflected the flow in union strength) and by providing penalty premiums for work outside the basic hours to dissuade non-scheduled work. Even with such controls, the aberrations of the industry have precluded the regularity in employment of which workers in other industries can boast. But some measure of normalcy has been achieved, and it is clear that if such controls were absent, employment would be hopelessly chaotic.

As the trial court found: "On the evidence adduced here it cannot be doubted that the 'overtime' premiums established by I. L. A. agreement were designed to curtail, and measurably succeeded in curtailing, excessive and abnormal hours " " " (R. 590). And, again: "The Collective Agreements, since the International Longshoremen's Association organized the longshoremen in the Port of New York in 1916, reflect the desire and purposes of the Union to decasualize

employment, to concentrate employment during basic eight-hour day and to avoid 'overtime,' except when absolutely essential * *" (Fdg. 37, R. 610-611).

If further confirmation is needed that the "overtime" rates provided in the New York long-shore contract were intended as true punitive overtime rates," it is to be found in the character of the rates themselves. Except in a few minor respects (see supra, notes 6 and 7), the "overtime" rates were one and one-half times the corresponding "straight time" rates. This conforms with the prevailing relationship between regular rate and overtime rate in American industry (Fdgs. 28 (b), (e), R. 605-606); the 50 percent overriding level was recognized by Congress and the courts as a true overtime mechanism to control and shorten hours," even long before it was ultimately

¹⁴ In 1917, the President was authorized to suspend the eight-hour law, in view of the emergency of World War I, provided "the wages of persons employed upon such contracts

[&]quot;The union method of 'enforcing' observance of the normal day upon employers is to set a higher hourly rate for hours beyond the normal than for the hours up to the normal number. The overtime rate is usually 'time and one half' (150 percent of the normal rate), with 'double time' (double the normal rate) for the days or half days not included in the normal working week. These are known as 'punitive overtime rates.' They allow the employer to work the men overtime in emergencies but impose a tax to insure that it is an emergency " "McCabe and Lester, Labor and Social Organization (1938), p. 72. See, also, to the same effect: Browne, What's What in the Labor Movement (1921), p. 363; Liberman, The Collective Labor Agreement (1939), p. 155.

graced as the appropriate differential for such purposes in the Fair Labor Standards Act itself. See Bunting v. Oregon, 243 U. S. 426, 436-437; Overnight Motor Co. v. Missel, 316 U. S. 572, 578.

This quantitative relationship between the contractual "straight time" rates and the contractual "overtime" rates, in our view, is also a complete answer to respondents' contention, apparently in-

shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one half for all hours work in excess of eight hours." (Act of March 4, 1917, c. 180, 39 Stat. 1192, 40 U. S. C. 326). In 1936, the Walsh-Healey Act (Act of June 30, 1936, secs. 1, 6, c. 881, 49 Stat. 2036, 41 U. S. C. 35, 40) prohibited work in performance of contracts over \$10,000 for the manufacture of supplies in excess of eight hours in any one day, or in excess of 40 hours in any one week, except as the Secretary of Labor might grant exceptions subject to a limitation that work in excess of the permitted maximum be paid for at "not less than one and one-half times the basic hourly rate received by the employee affected"; and the Secretary authorized overtime work at not less than "one and a half times the hourly rate or piece rate received by the employee." (41 C. F. R. 201.103.) In 1911 and in 1920, Congress legislated as to customs employees so as to limit their hours of work to a normal 8-hour working day, with penalty overtime for excess hours (Act of Feburary 13, 1911, 36 Stat. 899; Act of February 7, 1920, c. 61, 41 Stat. 402, 19 U. S. C. 267. See, also, Tariff Act of 1930, c. 497, Title IV, 46 Stat. 708, 715, 19 U. S. C. 1401; 1450, 1451; Customs Administration Act of 1938, c. 679, 52 Stat. 1077, 1082, 19 U. S. C. 1451.) Other statutes adopting the overtime technique are Act of July 24, 1919, c. 26, 41 Stat. 241, 7 U.S. C. 394 (employees of Bureau of Animal Industry); Act of March 2, 1931, c. 368, 46 Stat. 1467, 8 U. S. C. 109a (Immigration and Naturalization Service); Act of May 27, 1936, c. 463, sec. 6, 49 Stat. 1385, 46 U. S. C. 382 (b) (Inspectors of steam vessels); Act of June 19, 1934, c. 652, sec. 4, 48 Stat. 1066, 47 U.S. C. 154 (f) (2) (radio inspectors).

dulged by the court below, that the differential between the two was but a shift differential, that is, that the "overtime" rates, far from constituting true puntive overtime rates, were no more than the regular rates for night, Saturday afternoon, Sunday, and holiday work, set sufficiently higher, only to induce work during such undesirable peri-The trial court's conclusion that the different tial was not such a shift differential (R. 589-590) appears inescapable, in light of its findings, based on uncontradicted testimony and undisputed: (1) that a shift differential "is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts" (Fdg. 28 (e), R. 605); (2) that the "overtime" rates in these cases "were. designed to curtail, and measurably succeeded in curtailing" work outside the scheduled hours on weekdays (R. 590); (3) that shift differentials are usually 5 or 10 cents per hour and seldom exceed 15 cents an hour, whereas overtime premiums are generally 50 percent of the normal rate (Fdg. 28 (e), R. 606); and in light of the testimony that shift differentials never exist except when there are regularly established shifts of fixed duration (R. 332, 334, 356), which, the record shows, was clearly not the case in the longshore industry.15

¹⁶ In this respect, Cabunac v. National Terminals Corporation, 139 F. 2d 853 (C. C. A. 7), relied on by the court below

In industrial concepts, there is no such thing as a shift differential unless there are in fact regular shifts (R. 332-334, 426-428). And regular shifts were certainly not present in the New York longshore industry, except possibly in the case of some stevedoring companies during the war years, when, as will be shown, experiences on the docks were hardly characteristic of prevailing conditions in the industry. The three designated "shape"-times (see supra, p. 8) did not define three shifts, for they represented nothing more than three hiring times, designated for convenient assembling of the men, should work then prove to be available.

Contrast the manner in which the parties who wrote the collective agreement treated a case of true shifts when one presented itself: Under the system of collective bargaining, the negotiating committee for the union and the employers simultaneously negotiated and concluded eight different agreements for the period in suit, each dealing with different crafts. (All of these agreements are contained in the booklet of agreements effec-

⁽R. 657-658), is distinguishable from the present cases. In the Cabunac case, the difference between the so-called "straight time" rate and the "overtime" rate was apparently only 10 cents per hour (139 F. 2d, at 854) and was actually intended as an inducement to accept employment at unattractive hours. I. L. A. v. National Terminals Corp., 50 F. Supp. 26, 29 (E. D. Wisc.). Furthermore, the issue, foremost here, as to whether the differential was a true overtime penalty, was only a subsidiary question in the Cabunac case.

tive October 1, 1943, appearing in Defendants' Exhibit A.) One of these was the agreement here in question, affecting longshore work and designated the "General Cargo Agreement." Another was the "Port Watchmen Agreement." Unlike the services of the longshoremen cerered by the General Cargo Agreement, the services of the port watchmen were regularly required around the clock. Accordingly, the parties, as they had done in previous years, set up three regular shifts for the watchmen. The same rate of pay was provided for each of the shifts without any differential whatever, but it was provided that any overtime performed after the expiration of his shift would entitle the port watchman involved to time and one-half the regular rates provided in the agreement, whether such overtime hours were in excess of 40 or not. Had the "overtime" premiunt for longshoremen been designed as a shift differential, there would certainly have been similarly clear designation of the shift pattern in the General Cargo Agreement.

Nor were the contractual "overtime" rates for longshore work any the less true punitive overtime rates because they happened to be applicable to work during certain clock hours without regard to whether such work had been preceded by "straight time." The expert testimony was, and the district court found, that "the idea of excessivity " " was not an indispensable element of

the concept of overtime as understood. Overtime was also understood to cover hours outside of a specified clock pattern" (Fdg. 28 (a), R. 604-605). In industries, such as longshoring in the Port of New York, in which, as we have noted, employers might find it to their advantage to start and stop at irregular hours and in which workmen generally shift from one to another employer during the same day or week; limiting the workday merely by reference to a given maximum number of permissible hours would be ineffective as a deterrent to excessive hours. It would be possible for men to be worked greatly in excess of 8 hours per day or 40 hours per week without their securing the protective benefit of the deterrent overtime wage merely by being employed by more than one em' ployer. In industries such as these, the only feasible method of preventing overwork and spreading employment is to establish a specific schedule of clock hours as "straight time" and to impose the overtime penalty rates for work during all other excessivity."

The prevalence in American industry of employment arrangements in which overtime is paid for work outside acceptable scheduled hours, approximating 8 per day and 40 per week, is indicated infra, pp. 55-60. Even in industries favored by regularity in employment, overtime rates have generally been provided not only for excessive work but for work during certain unacceptable periods as well, without regard to excessivity. Thus, many union contracts make Sundays and holidays overtime periods "as such," and the meal periods are similarly treated in some agreements. Premium Pay Provisions in Selected Union Agreements, 65

clearly conceived of a 50 per cent. overriding wage as a means for shortening hours of work on the assumption that it would act as a deterrent. On this assumption, a 40-hour maximum will presumably bring about a normal workweek of five 8-hour days. By the same token, the discouragement, by an overtime penalty, of work outside a normal 8-hour day will presumably result in working only a 40-hour week. The arrangements here, therefore, serve the congressional purpose.

Thus, in summary, the "overtime" rates specified in the collective bargaining agreement in effect in the longshore industry in the Port of New York during the period in suit were designed by the parties to serve as true punitive overtime rates and so to gain what measure of regularity could be achieved in view of the conditions of the longshore industry. Fixed at levels high enough to deter the stevedoring companies from working the longshoremen at other than the normal "straight time" hours, they reflected the purpose, common to the demand of all American organized labor, "to discourage work beyond a certain number of hours per week, and to discourage work during specified periods of the day" (Fdgs. 28 (e), 39, R. 605, 612). And, as the trial court found, they did, in fact, accomplish the end for which they were intended, that is, "preventing substantial amounts of overtime, except during the unusual

Monthly Labor Review (Oct. 1947), pp. 419, 421-423, 425. See also infra, pp. 58-59 and note 20.

conditions existing during the war period" (R. 605).

B. The "straight time" hours, in actual fact, constituted the normal, non-overtime workweek in the industry, and the "straight time" rates, the actual rates paid exclusive of overtime

Since the "straight time" rates provided in the collective bargaining agreement in the New York longshore industry were plainly intended as the regular rates of employment and the "overtime" rates solely as a deterrent to work during the non-scheduled hours, we respectfully submit that the "straight time" rates must be held the regular rates, for statutory purposes, unless inconsistency between the provisions of the centract and the actual practice is clearly apparent. The trial court found no such inconsistency, and we submit that none exists.

Petitioners introduced into evidence in the district court a group of statistical tables (Defendants' Exhibits D, E, and J), which, so far as we know, constitute the only reliable port-wide statistical study of the work patterns prevalent in the longshore industry in the Port of New York. The accuracy of two of these tables (Defendants' Exhibits D and E) was stipulated by the parties (R. 28-30); the trial court found the third (Defendants' Exhibit J) also to be accurate (Fdg. 29 (d), R. 607-608). The study plainly demonstrates the effectiveness of the contractual

"overtime" rates on the longshoremen's working day. For, the preponderance of "straight time" hours over overtime worked on the New York docks is marked. Thus, during the years 1932 to 1937, inclusive, 79.93 per cent. of the total number of man-hours worked were within the "straight time" hours of the basic working day and week; and during the ten-month period immediately following the enactment of the Fair Labor Standards Act, that is, from November 1, 1938, to August 31, 1939, 75.03 per cent. of the total manhours were worked during such "straight time" hours (Defendants' Exhibits D and E; Fdg. 29 (a), R. 606). Moreover, a substantial amount even of the 20-25 per cent, of man-hours which was worked during the overtime period was not in the night hours, but on Saturday afternoons and on Sundays and holidays. Thus, during the 1932-1937 period, 29.26 per cent. of the overtime was allocable to those extra days rather than to night hours; and during the 1938-1939 period, 28.35 . per cent. of the overtime was so allocable (Defendants' Exhibits D and E).

It is true that with the intensification of the industrial effort and the attendant expansion of trade during the defense and war years, changes in the work patterns became evident in the direction of increases in the ratio of overtime work. But, even during the last three quarters of 1944 and the first quarter of 1945, when war industrial

activity was at or close to its peak, the majority of the total man-hours worked, 54.5 per cent., was still being worked during the "straight-time" periods (Defendants' Exhibit J; Fdg. 29 (d), R. 607). And a large portion of the overtime, too, approximately 45 per cent. of it, was Saturday afternoon, Sunday, and holiday work, rather than night work (ibid.). Moreover, it must be remembered that the notable increase in overtime on the New York waterfront during the war years was, in large measure, a consequence of governmental policy itself." For, the fact is that the exigencies of total warfare compelled the Government to forego the program of restricting overtime, which is implicit in the Fair Labor Standards Act, and, contrariwise, to foster, if not indeed to impose a regimen of overtime work. Thus, Executive Order 9301 (8 F. R. 1825, 29 U. S. C., Supp. III, 207 note) required government contractors and, in effect, all war industries, to maintain a 48-hour minimum workweek for the duration of the war. Thereby, for the war period, the policy of the Fair Labor Standards Act to

¹⁷ As the trial court found, "Some men, other than the [respondents], refused, even in war time, to work during the night, unless it was absolutely unavoidable. The employers found it difficult to get men to turn out for a 6:55 p. m. shape; they not infrequently did not show up at all, or flatly refused to work at night. Meetings were held by the Union's representatives with the military authorities to work out ways and means to avoid the establishment of a precedent for working around the clock" (Fdg. 27, R. 604).

curtail overtime was, in substance, suspended, and the public program was so reversed as to compel what the Act sought to prohibit as excessive hours of work. Since Congress failed to suspend the overtime provisions of the Act, workers subject to its provisions apparently continued to be entitled to time and one-half the regular rates for all hours worked in excess of 40 hours per week even during the war period; we do not mean to gainsay that. We do urge, however, that to accord consideration to the abnormal experience of the war years in ascertaining the "normal, non-overtime workweek" (Walling v. Helmerich & Payne, 323-U. S. 37, 40), and, thereby, the regular rates of employment, would be, to accord undue significance to the abnormal in determining the norm. Moreover, to do so would be to visit a fraud upon America's wartime employers. As the trial court said (R. 585-586):

mand for production, the 48 hour work week became quite general. In the case of newly recruited employees in the war industries, 48 hours measured the "normal" work week throughout the term of their employment. In a sense, the 40 hour week was merely a theoretical fiction as opposed to the "real" fact of a 48 hour week. The logical extension of [respondents'] argument would require a holding that in paying such employees for the 8 hours of overtime at a rate equal to 150%

of the straight time rate, such employers had violated the F. L. S. A.; that the wages payable to such employees must now be recalculated by finding the "regular rate" to consist of the quotient of total weekly wages, divided by 48, and the overtime rate as equal to 150% thereof. Would employers, even in the exigencies of the war, have so rapidly yielded to the demands of national policy for a longer work week if they could foresee such an enlarged wage liability?

Whatever the answer to such a rhetorical question, it is clear that the application of either of [respondents'] formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry. (Italics supplied).

If the decision below is affirmed, myriad employers who, under government edict, lengthened their workweeks to 48 hours might now be met with gigantic claims for unpaid wages, and an excessive and unjust diability might thus be saddled on unsuspecting industry by virtue of irreconcilable government programs directed to contrary ends.¹⁷⁶ For it might be urged there, as respondents

^{- 17}a The Portal-to-Portal Act (May 14, 1947, c. 52, 61 Stat. - 29 U. S. C. A. 251, et seq.) conceivably may diminish such

here urge, that the 48-hour workweek, instituted during wartime, had become the regular and normal week, that the time and one-half rates for the last 8 hours must be included in computing the regular rate, and that additional overtime compensation is owing to the millions of employees affected."

contingent liability. But the extent of the relief, it may afford is not now ascertainable. Moreover, it certainly would not remove or resolve the problems posed by these cases, which are of great significance to the industries affected for the future.

18 It is suggested that insuperable operating difficulties would ensue if the existence or non-existence of true overtime in every case were to be determined according to whether the work fell without or within hours "normally" worked, if the "normalcy" of the hours is to be determined exclusively according to some particular ratio of "straight time" to overtime for some particular period of time. To do so would invalidate bona fide collective bargaining agreements providing for "straight time" pay for the first 40 hours and overtime pay for work in excess of 40 hours in those industries which customarily work varying numbers of hours per week. Since occasions frequently arise for enlarging the workweek in particular plants, for varying periods, beyond the pattern which previously existed, the very indefiniteness of the word "normal" poses an insoluble operating problem as to how long and to what extent the workweek may be enlarged before the enhanced number of hours must be regarded by the employer as the "normal" or "regular" workweek, with the consequent result that the "regular rate" of pay would cease to be the "straight time" rate established by an applicable collective bargaining agreement and become a composite of the contractual "straight time" hours and the contractual overtime hours. The true test must be purpose and concordance of the arrangement and actual practice within the industry with the congressional objective.

We have quoted at some length from the district court's opinion because we believe that it affords a complete answer not only to respondents' reliance and that of the court below on the work patterns during the war years, but also to their reliance on the patterns of individual respondents. There is no question that the work patterns of respondents varied from those of the industry as a whole, that many of the respondents worked a substantial number of non-scheduled. hours, and that some worked only during such overtime periods. But it must be remembered that all their work was performed during the war years; the first day of work involved in these suits was March 24, 1943, the last October 22, 1945 (see table opposite R. 612). Consequently, the employment records of the individual respondents. reflect the normal industry patterns no more accurately than does the unbalanced wartime study in Defendants' Exhibit J; indeed, since -they present but isolated instances rather than the rounded-out statistical averages of the port-wide study, their aberration is the greater. The cases in which individual longshoremen, such as some of respondents here, have been employed solely or mainly during overtime periods are exceptional Even during the abnormal war years, the proportion of work performed by men who worked solely at night on the New York docks was quite small: during the 1944-1945 period studied, the

concentration of work during the basic working day was 2.4 times as great as that during the remaining 16 hours of the day (Defendants' Exhibit J; Fdg. 29 (e), R. 608). During the 1932-1937 period, it was almost eight times as great; and during the 1938-1939 period, six times as great (Defendants' Exhibits D and, E; Fdg. 29 (e), R. 608). Furthermore, the work done between 5 p. m. and 8 a. m. on weekdays by men who had begun work after 5 p. m. was no more than 4.17 per cent. of the total man-hours worked during the periods prior to the outbreak of the war; and even during the war years, it did not far exceed 11 per cent. (Defendants' Exhibit D, E, and J; Fdgs. 29 (b), (d), R. 607-608).

Such atypical cases can have little significance in the face of the over-all industry patterns. If such cases are to be permitted to preclude the establishment of industry-wide wage and hour formulae, there would seem to be little possibility of achieving any measure of uniformity and regularity in any industry, and particularly such as the longshoring industry, marked, as it is, by extreme irregularities in employment opportunities. We respectfully submit that such atomization of wage and hour arrangements is not required by the Fair Labor Standards Act. Regular rate remains a real and true concept notwithstanding the existence of some small number of workers in an industry who, because of special circumstances, work preponderantly in overtime

periods. The purposes of the Fair Labor Standards Act will not be advanced by abstracting one individual pattern from the industrial context of which it is an integral part and treating it as an isolated contract without regard to the situation in the industry as a whole. Cf. East New York Bank v. Hahn, 326 U. S. 230, 232. Indeed, this Court has more than once relied on average industry figures in ascertaining the relationship of contractual rates to rates actually paid (Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 425; Walling v. Harnischfeger Corp., 325 U.S. 427, 429), and has had occasion to remark on the necessity of treating wage and hour situations on an industry-wide basis rather than on the basis of individual employment experiences "in a bona fide attempt to avoid complex difficulties of computation." Jewell Ridge Corp. v. Local, 325 U.S. 161, 170.

We cannot, therefore, hope to achieve any picture of a norm in any industry if we permit the abnormalities of wartime experience to color it or the aberrant employment records of individual longshoremen during the war period to blemish it. The "actual facts" must be derived from the peacetime as well as wartime patterns, and these are the facts: (1) that the "normal, non-overtime workweek" (Walling v. Helmerich & Payne, 323 U. S. 37, 40) in the longshore industry in the Port of New York was the basic workweek established by the collective bargaining agreement—8 a: m.

to 12 Noon and 1 p. m. to 5 p. m. on Mondays to Fridays, inclusive, and 8 a. m. to 12 Noon on Saturdays; (2) that the regular rates at which respondents and the other longshoremen were employed, "the actual payments, exclusive of those paid for overtime, which the parties agreed * * * [should] be paid during each workweek" (Walling v. Harnischfeger Corp., 325 U. S. 427, 430), were the "straight time" rates provided in the agreement (cf. 149 Madison Avenue Corp. v. Asselta, 331 U.S. 199, 204); and (3) that since the "overtime" rates were one and onehalf times such regular rates and were designed to operate as a deterrent to excessive or undesirable work, they constituted true overtime compensation, which might properly be credited against the statutory obligation, and their payment to respondents for all work performed in excess of 40 "straight time" hours in the workweek constituted full compliance with the requirements of Section 7 (a) of the Fair Labor Standards Act, supra, p. 3.

II

THE WAGE AND HOUR ARRANGEMENTS HERE IN QUESTION ACCORD FULLY WITH THE PURPOSES AND POLICIES OF THE FAIR LABOR STANDARDS ACT AND ARE NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

The facts are, then, as we have demonstrated, that the contractual "straight time" rates were the rates actually paid for work performed during

the normal, non-overtime workweek in the longshore industry in the Port of New York during the period in suit; that that practice was, in all respects, intended by the union and the stevedoring companies and embodied in their collective agreement; that the contractual overtime rates were designed to and actually did inhibit work outside the scheduled hours; and that the "straight time" rates were, therefore, the regular rates, exclusive of overtime, at which the longshoremen, respondents among them, were employed. Such was, in effect, the ruling announced by the trial court. That ruling, we submit, is in complete accord with the purposes and policies of the Fair Labor Standards Act and not in conflict with prior decisions of this Court.

A. The wage and hour arrangements in the industry accordfully with the purpose and policy of the Act to reduce working hours and spread employment

As the Court has noted, Congress, when it provided that premium payments of time and one-half the regular rates be paid for work in excess of 40 hours, had the dual purpose "of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek" "Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 423-424. "" although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured

additional pay to compensate them for the parten of a workweek beyond the hours fixed in the Act." Overnight Motor Co. v. Missel, 316 U. S. 572, 577-578. Those statutory purposes were plainly achieved by the wage and hour practices here in question.

There is no need to document again the unmistakable intent of the contracting parties, when providing the time and a half contractual overtime rates for work in the non-scheduled hours. to deter the stevedoring companies from working men during such periods (see supra, pp. 29-39); nor the effectiveness of those provisions in concentrating the work on the New York docks during the scheduled "straight time" hours (see supra, pp. 39-48). Such concentration, of course. spelled a reduction in the hours of work and the employment of more men on each job. And, of course, those longshoremen who, in the event of emergency, were forced to work overtime were compensated for the burden of working during undesirable and excessive hours by time and a half pay. In every respect, therefore, the wage and hour practices in the New. York longshore industry during the period in suit conformed with the stated purpose and policy of the Fair Labor Standards Act.

The "fortuitous circumstance" (as the trial court characterized it (R. 591)) that some of the respondents worked solely during the non-scheduled hours during the period in suit, and that,

consequently, they would receive the same contractual overtime rates for work in excess of 40". hours as they had earned during the first 40 hours in the week, detracts nothing from the deterrent effect of the overtime rates. The 50 per cent. overriding penalty, which successfully dissuaded the stevedoring companies from working outside the regularly scheduled hours except in emergencies, also operated to discourage work beyond 40 hours in the week. That the penalty was no greater in the latter case than in the former did not rob it of its punitive effect. Some of the deterrent quality of the rate may indeed have been lost in such circumstances, but not as a consequence of the character of the rates; rather, because such exceptional cases of exclusively overtime work were incidents of wartime, when the influence of all penalty premiums in curtailing excessive hours paled in the light of the urgencies of total warfare. The time and one-half rate device embodied in the Fair Labor Standards Act. was adopted "in a period of widespread unemployment and small profits," when "the economy inherent in avoiding extra pay was expected to: have an appreciable effect in the distribution of available work." Overnight Motor Co. v. Missel, 316 U. S. 572, 578. It could not have proved effective in times of great stress, such as the war years, when considerations of profit were secondary. That it did not then effect a curtailment of hours is clear from the vast amount

of overtime in all war industries, notwithstanding the accompanying time and one-half overtime obligation. See Fleming, The Fair Labor Standards Act in the War Economy, 9 Law and Contemporary Problems (1942), 491, 496-497. The point to be appreciated is that the rule for application of Section 7 (a) of the Act advanced by respondents and adopted by the court below, though it undoubtedly would have meant more money in the pockets of the workers, would have meant no significant curtailment of hours or spread of available work during the war years.

B. The wage and hour arrangements in the industry accord fully with the purpose and policy of the Act to preserve the freedom and integrity of collective bargaining

Act, did not intend to abridge the national policy, asserted only a few years earlier in the National Labor Relations Act, of establishing and preserving the freedom and prestige of collective bargaining. The Senate Committee on Education and Labor, reporting out the bill which eventually was enacted as the Fair Labor Standards Act, stated (S. Rep. No. 884, 75th Cong., 1st Sess., pp. 3-4):

The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own

contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.

The Committee on Labor of the House of Representatives reported (H. Rep. No. 1452, 75th Cong., 1st Sess., p. 9):

The bill is intended to aid and not supplant the efforts of American workers to improve their own position by self-organization and collective bargaining.

As this Court has remarked, "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." Brooklyn Bank v. O'Neil, 324 U. S. 697, 707, note . 18. Congress has only recently, in the Portal-to-Portal Act of 1947 (c. 52, 61, Stat. -, 29 U. S. C. A. 251, et seq.) and again in the Labor-Management Relations Act, 1947 (c. 120, Title I, § 101, 61 Stat. -. 29 U. S. C. A. 151; et seq.), reaffirmed the public interest in encouraging and maintaining the practice and procedure of collective bargaining. short, as the trial court said (R. 587): "* F. L. S. A. should not lightly override the policy. of collective bargaining. F. L. S. A. establishes

minimum standards. Collective bargaining has freedom to move unhampered above the floor F. L. S. A. establishes.

In these circumstances, we respectfully submit, courts should be most reluctant to strike down provisions of collective bargaining agreements and most careful that they do so only where such provisions are clearly irreconcilable with the statutory mandate. The provisions in the long-shore agreement can hardly be said to be so palpably unlawful. The decision below, therefore, in lightly brushing them aside, betrays an unjustifiable disregard for the significance of collective bargaining in the industry.

¹⁶a It is noteworthy that the only clue in the legislative history of the Fair Labor Standards Act to the meaning of the term "regular rate" suggests that Congress may have intended it to signify the rate agreed on by the parties. Thus, in the early stages of the Act's history, the words "agreed wage" were used as the equivalent of the term "regular rate." The bills introduced and reported out in the Senate (S. 2475, 75th Cong., 1st sess.) and that introduced in the House (H. R. 7200, 75th Cong., 1st sess.) provided that employment beyond the maximum workweek be permitted only upon payment of wages "at the rate of one and one-half times the regular hourly wage rate at which such employees were employed" and that reparation for violations of this overtime requirement be granted "at the rate of one and one-half times the agreed wage" at which the worker was employed "or the minimum wage, * * , * whichever is higher." The transition from the language "agreed wage" to "unpaid overtime compensation" in what later became Section 16 (b) of the Act is unexplained; the change appears to have been adopted in the interests of simplification; plainly, no change in congressional intent is indicated.

It must ever be kept in mind that the agreement here was a response to the troublesome casual employment conditions in the longshore industry in the Port of New York. As the trial court put it, "it is the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589), one of the many "complicated industrial situations" (Kirschbaum Co. v. Walling, 316 U. S. 517, 523) to which the Fair Labor Standards Act was addressed. To impose the rule of the court below on the indus ry would be to substitute the court's judgment as to what the wage and hour arrangements should be for the joint judgment of the stevedoring companies and the longshoremen, who have to live with those arrangements. As this Court has only recently said: "It was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement. Walling v. Belo Corp., 316 U. S. 624." 149 Madison Avenue Corp. v. Asselta, 331 U. S. 199, 203-204. And, surely, "Decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation are legitimate objectives of a collective labor agreement" (R. 588), even as much as the "desirable objective" of regularizing the weekly income which was approved in Walling v. A. H. Belo Corp., 316 U. S. 624, 635. The longshoremen's union has, itself, stated, in this proceeding, that if the decision below is permitted to stand, the achievements it has gained by collective bargaining "would be menaced." Brief of International Longshoremen's Association in Support of Petition for Writs of Certiorari, pp. 12-13.

The district court was acutely aware of the deleterious consequences of adopting the rule advanced by respondents (R. 586):

* * Upon such a premise, genuine collective bargaining cannot live.

* * The inevitable consequence of such a rule would be severely to restrict the scope of collective bargaining, to check the development of agreements more favorable to employees than the minimum standards established by F. L. S. A. and to retard the use of overtime even when national interest required it.

This is evident in view of the many collective bargaining agreements now in effect which establish workweeks of less than 40 hours and the more numerous agreements which limit workdays to 8 hours. In such cases, the basic rates are provided as compensation for the stipulated hours of work, and time and one-haif pay is provided for all work performed in periods outside the scheduled hours. The Bureau of Labor Statistics has reported that "Most union agreements in effect in the second half of 1946—85 percent of those studied—provided overtime pay at the rate of time and a half for all work in excess of 8

hours a day or 40 hours a week." Premium Pay Provisions in Selected Union Agreements, 65
Monthly Labor Review (October 1947), p. 419.
Manifestly, such contracts do not provide for payment of a higher wage for the hours worked in excess of 40 hours in the week than the time and one-half rates paid for the hours worked prior thereto in excess of the 8-hour day or during other contractual overtime periods." If respondents prevail here, however, and a higher wage is thus deemed required by the Fair Labor Standards Acts, these contractual provisions, so favorable to employees, may be abandoned, and the advantages which such narrowing restrictions on workdays and work-

[&]quot;It is noteworthy that such pyramiding of overtime on overtime has been frowned upon in connection with the administration of other governmental wage programs. Thus: (1) Under the Walsh-Healey Act (41 U. S. C. 35, et seq.) which limits the workday on public contracts to 8 hours as well as the workweek to 40 hours, pay is calculated upon daily overtime or weekly overtime depending on which is the greater, but never on both. Rulings and Interpretations under Walsh-Healey Public Contracts Act (Revised), 2 C. C. H. Labor Law Service, par. 35442. (2) The War Overtime Pay Act of 1943 specifically provides that overtime paid . under other Federal statutes "shall not also form a basis for overtime compensation under this Act" (50 U. S. C. App., Supp. V, 1407). (3) The Secretary of Labor, in interpreting Executive Order 9240 (40 U. S. C., Supp. III, 326 note), regulating overtime wage compensation during the war period, declared that it was not intended that the rule established therein of premium pay for the sixth and seventh consecutive days of work in the week should be used for the purpose of pyramiding overtime rates for a particular day. Interpretative Bulletin No. 1 of Executive Order 9240, February 17, 1943.

weeks bring to employees, in terms of shorter hours and fair recompense for work during undesirable hours, may largely be lost to them. That such advantages are substantial is eloquently illustrated by the fact that in the longshore industry in the Port of New York, 8½ times as much contractual overtime was worked and paid for as such during the 1938–1939 period as overtime which would have been paid if measured by the 40-hour weekly maximum of the Fair Labor Standards Act (Defendants' Exhibit F; Fdg. 29 (c), R. 607).

We submit that it is inconceivable that, by enacting the Fair Labor Standards Act, Congress could have intended to strike down and outlaw the numerous contracts establishing workday limitations by reference to clock-hour schedules and overtime rates for work outside such limits. The survey of the Bureau of Labor Statistics already referred to (which covered 437 union agreements in effect on July 1, 196, in 31 industries employing slightly over two million workers), disclosed such provisions in contracts affecting workers in the following industries: Pacific Coast longshoring; alloying, rolling, and drawing of nonferrous metals; automobiles; canning and preserving; cotton textiles; men's clothing; shipbuilding; smelting and refining of nonferrous metals; and tobacco. Premium Pay Provisions in Selected Union Agreements, 65 Monthly Labor Review (October 1947), p. 419. Similar provisions have figured from time to time not only in contracts governing those industries but also in collective agreements affecting portions of the building, printing, and upholstery and floor-covering trades, and of the electric and radio equipment, petroleum-refining, trucking, metalmining, chemical, cotton-textile, coal by-products, and bituminous coal-mining industries. To read into the Fair Labor Standards Act a condemnation of such wage-hour patterns as those here involved would, therefore, be to invalidate widespread contractual arrangements in many industries. Thus, to affirm the decision below, which would preclude clock-hour limitations on daily working hours except at the risk of having

²⁰ Such wage-hour patterns are referred to in the following publications of the Bureau of Labor Statistics of the Department of Labor: Union Wages and Hours in the Building Trades, July 1, 1946, Bulletin No. 910, p. 17; Union Wages and Hours in the Printing Trades, July 1, 1945, Bulletin No. 872, pp. 13, 14; Collective Agreements in Upholstery and Floor-Covering Trades, Serial No. R. 654, p. 6; Collective Bargaining by United Electrical, Radio, and Machine Workers, Serial No. R. 779, p. 5; Union Agreements in the Petroleum-Refining Industry in Effect in 1944, Bulletin No. 823, p. 5; Union Wages and Hours of Motortruck Drivers and Helpers, July 1, 1945, Bulletin No. 874, p. 6; Development of Collective Bargaining in Metal Mining, Serial No. R. 817, p. 5; Collective Bargaining in the Chemical Industry, May 1942, Bulletin No. 716, pp. 7, 9; Union Agreements in the Cotton Textile Industry, Bulletin No. 885, pp. 19, 52; Agreements of Gas, Coke, and Chemical Workers, Serial No. R. 927, pp. 6-7. As to the bituminous coal-mining industry, see the collective bargaining agreement at R. 15-19, United States of America v. United Mine Workers of America, et al. No. 759, O. T. 1946.

the time and one-half rates established for work in non-scheduled hours declared the regular rates for such work and thus, in turn, radically increasing the wage payable for overtime after 40 hours in the week, would affect not only the New York longshore industry but numerous other industries as well. Moreover, since the decision imposes the same restrictions with respect to limitations on Saturday and Sunday work, even more extended impact may be expected; for Saturday and Sunday work are treated as overtime "as such" and compensated at time and a half in a substantial number of organized industries. Nor may the longshore industry be dismissed as unique in the irregularity of employment opportunities there. Other industries too are marked by degrees of irregularity; otherwise there would be no need for restricting workdays to scheduled hours. And the substantial amount of night work in longshoring, which impressed the court below, is a product of the war years and was characteristic then of many other industries as well."

These very cases would probably not have arisen but for the abnormalities of the war years. Prior thereto, there was little work done on the New York docks for any one employer in excess of 40 hours in the week. Thus, in the ten-month period from November 1, 1938 to August 31, 1939, only 8.01 percent of these employed as longshoremen worked over 40 hours in any week and only 2.94 percent of the total number of man-hours worked was allocable to such excessive hours (Defendants' Exhibit F; Fdg. 29 (c), R. 607).

C. The wage and hour arrangements in the industry are not in conflict with prior decisions of this Court

The court below believed that it was "bound" to reverse the judgments of the trial court "by the pertinent decisions of the Supreme Court" (R. 655). The decisions which the lower court apparently had in mind are Walling v. Helmerich & Payne, 323 U. S. 37; Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419; Walling v. Harnischfeger Corp., 325 U.S. 427, and 149 Madison Avenue Corp. v. Asselta, 331 U. S. 199, in which wage plans were held violative of Section 7 (a) of the Fair Labor Standards Act; and Walling v. A. H. Belo Corp., 316 U. S. 624, and alling v. Halliburton Oil Well Cementing Co., 331 U. S. 17, in which wage plans were upheld. We respectfully submit that the court below misread these decisions, for the plan in issue in the present cases differed radically both in form and purpose from those rejected in the first group of cases.

Helmerich & Payne, supra, dealt with a socalled split-day plan. Prior to the enactment of the Fair Labor Standards Act, Helmerich & Payne's employees had worked 8-, 10-, or 12-hour shifts or tours and had been paid a fixed wage for each hour. Thereafter, in accordance with the new plan, the tour was aribitrarily split into two parts, the first four hours to be paid for at specified "base" or "regular" rates and the last four

hours, treated as "overtime," to be paid for at one and one-half times the "base" rates; the "base" rates were never to apply to more than 40 hours in any workweek. The contractual rates had admittedly been calculated to insure that the total wages for the tours worked should continue to be the same as before, and thereby to avoid the necessity of paying more for work in excess of 40 hours a week than had been paid prior to the enactment of the statute. Only in the extremely unlikely case where an employee's tours totalled more than 80 hours in a week did he become entitled to any pay in addition to the regular tour wages. The Court, noting that by the plan the "actual and regular workweek was shorn of all significance" (323 U. S. at 39), struck it down as "obviously inconsistent with the statutory purpose." Id., at 40. Neither of the dual objectives of Section 7 (a), said the Court, could be attained under the split-day plan: "(1) to spread employment by placing financial pressure on the employer through the overtime pay requirement * * *; (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." Ibid. The contractual "base" or "regular" rate was a fictitious" regular rate, "arbitrarily allocated to the first portion of each day's regular labor" (id., at 41), computed "in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (id., at 42); it was not "the hourly rate actually paid for the normal, non-overtime workweek. Overnight Motor Transportation Co., v. Missel [316 U. S. 572]." Id., at 40. The Court summarized the vice in the split-day plan as follows, id., at 41:

lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale.

The arrangements in the New York longshore industry obviously are quite dissimilar to the split-day plan. Here, as the trial court noted, "we are dealing with a collectively bargained agreement which is the natural development of a long history" (R. 587) and which introduced no innovation, but, to the contrary, carried forward into the period in suit, a wage-hour pattern continuously in use in the industry since 1916. This was no device invented, as in Helmerich & Payne, to circumvent the overtime requirements of the Fair Labor Standards Act and "to perpetuate the pre-statutory wage scale." The "straight time" rates here were plain and definite; in no manner were they derived "from ingenious mathematical manipulations;" they were unmistakably the rates "actually paid for nonovertime hours." And the "overtime" differentials were true punitive overtime premiums, which both compensated employees for excess hours worked and compelled employers to concentrate the work on the docks into the regular, daytime hours.

The piece-work guarantee wage schemes in the Youngerman-Reynolds and Harnischfeger cases were set aside for much the same reasons as impelled the rejection of the Helmerich & Payne plan. In Youngerman-Reymolds, 325 U. S. 419, 422-423, where stackers of lumber had been paid at piece rates which yielded them on the average of 51 cents an hour, new contracts provided a "basic" or "regular" rate of 35 cents per hour for the first 40 hours worked in the week and "not less than one and one-half times such basic or regular rate * * *" for all hours in excess of 40, with the guaranty that the employee should receive for all regular and overtime work a sum arrived at by applying specified piece rates per thousand board feet to the actual amount of lumber stacked and which, translated to an hourly basis, amounted to approximately 59 cents per hour for both regular and overtime hours. The court found that except in extremely unlikely situations, the contractual "regular" rate was never actually paid (325 U.S., at 425), and held, therefore, that that rate was an "artificial" one (ibid.), an "arbitrary label" (id., at 424), and not "the hourly rate actually paid for the normal, non-overtime workweek" or the basis actually

used "for calculating the compensation received for overtime labor" (id., at 426). The contractual rate, said the Court, was "fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees" and established solely to enable respondents "to nullify all the purposes for which § 7 (a) was created" (ibid.).

Again, in the Harnischfeger case, 325 U.S. 427, the Court held a piece-work arrangement invalid as "a mere artifice unrelated to wage-earning actualities." 325 U.S., at 433 (Frankfurter, J., concurring). There, the contractual scheme grouped the company's workers into two classes called "incentive workers" and "non-incentive workers." The incentive workers were compensated on a piece-work basis, accompanied by a minimum hourly guaranty. Each employee was paid his "base" or "hourly" rate for all time worked, but, in addition, received, as an "incentive bonus," the difference, if any, between the base pay earned on each job and the "job price" for that job which was determined by time studies of the job. Payment of the "base" rate was guaranteed. For overtime in excess of 40 hours in the week, an additional sum equal to 50 percent of the guaranteed "base" rate was paid. The fact was, however, that about 98.5% of the incentive workers nearly always performed their jobs with sufficient speed to earn more at the piece rates than they would at their "base" or "hourly"

rates; moreover, on jobs that had not yet been "time studied," the company agreed it would pay incentive workers hourly rates at least 20 per cent. higher than the contractual "base" rates. and a similar arrangement was in effect when such workers were temporarily assigned to "nonincentive" work. Since the incentive boruses were "a normal and regular part" of the employees' income (325 U.S., at 432), "the vast majority of the employees * [having received] regular though fluctuating amounts for work done during their non-overtime hours in addition to their basic hourly pay" (id., at 430), the Court held that the regular rates were, in fact, higher than the base rates and that the latter lost "their significance in determining the actual rate of compensation" (id., at 432).

There is, of course, no analogy between those situations and the arrangements here in question. In the longshore industry, the "straight time" rates were the only wages which were paid for work during non-overtime hours, the overtime rates were designed for truly punitive purposes, and, except for the war years, the vast preponderance of employees earned rates other than straight time rates—only in extraordinary emergencies. There is, thus, no "such dubiety as to the role" of these "straight time" rates as led to the rejection of the basic piece rate as the regular rate in Harnischfeger (325 U. S., at 434, Frankfurter, J., concurring).

The recent decision in 149 Madison Avenue Corney. Asselta, 331 U.S. 199, is no more perthent to the present proceeding. There, the arrangement in question was put into effect by a contract entered into in 1942. Prior to that time, the service and maintenance employees working in the company's loft building were paid flat weekly wages for workweeks of specified length, no hourly rates being specified and no attempt being made to pay time and one-half for hours over 40 in the week. The 1942 agreement provided a 54-hour workweek for watchmen and a 46-hour week for the other regular employees, and established weekly wages, stated to include both compensation for the regular hours of employment and time and one-half for the hours in ' excess of 40 in the week. It was further provided that the hourly rates for those regularly employed more than 40 hours per week should be determined "by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of forty (40) hours." As a matter of practice, however, only the hours the employee was scheduled to work and the weekly wage for such scheduled workweek entered into calculation of the non-overtime hourly rate, that rate remaining constant regardless of whether an employee worked more or less than the scheduled number of . hours. It was on that constant hourly rate that the premium rates were paid: 1% times the formula rate for all hours worked by regular employees, except watchmen, in excess of 46 in the week, and two times the formula rate for all hours worked by watchmen in excess of 54 in the week. Moreover, where employees were absent for excusable causes, the agreement provided that six of the hours worked by them should be compensated as overtime regardless of whether the total of hours actually worked in the week exceeded 40; whereas non-excusable absentees were paid a sum obtained by multiplying the number of hours actually worked times the formula rate, being given credit for overtime only in case the number of hours actually worked exceeded 40. Again, parttime workers employed for less than the scheduled workweek were hired at a specified schedule of hourly rates obtained by dividing the weekly wage paid the regular employees by the number of hours in the regular-workweek, despite the fact that according to the terms of the formula the weekly wage included both regular and overtime pay. After considering the terms of the agreement and the operation of the plan in actual practice, the Court held that the contract formula rate was not the regular rate of pay because no use whatsoever · was made of the formula rate in determining the wages for part-time workers and there was no consistent application of the formula rate even as to regular employees. 331 U.S., at 202, 204-205, 208.

Certainly, this most recent decision on the issue of regular rate, involving complicated wage formulae, is wholly irrelevant to the present suits. The contractual "straight time" rates here were, without question, actually and consistently paid to all longshoremen, for work dur ug the scheduled basic working days and working weeks (except so far as Saturday morning work might exceed 40 "straight time" hours, when the overtime rates were paid), and the overtime rates were uniformly paid for work during all non-scheduled hours.

The instant cases are, then, in no wise related to Helmerich & Payne, Youngerman-Reynolds, Harnischfeger, and Asselta. Though equally dissimilar, so far as the wage plans are concerned, to the Belo case, 316 U.S. 624, and the Halliburton case, 331 U.S. 17, we submit that they are much more readily assimilable, in principle, to these two latter cases than to the first group. Here, as in Belo and Halliburton, the trial court found that the wage contract was bona fide and that it was intended to and did really fix the regular rates at which the longshoremen were employed (331 U.S., at 20); again, the contract

²² As the court below remarked (R. 657), the trial court "relied on Walling v. Belo Corp., 316 U. S. 624." To the extent that that case is applicable, such reliance can hardly be questioned. The trial court's opinion, however, clearly demonstrates that its judgment is not grounded blindly on that case but rather on a careful consideration of all pertinent facts and decisions.

here, too, specified "a basic hourly rate of pay and not less than time and one-half that rate for every hour of overtime work beyond the maximum hours fixed by the Act" (316 U. S., at 634); the contract was not an attempt to evade the overtime requirements of the Act but rather an effort to achieve the "desirable objective" of some regularization of an employment situation where the employees "have no usual workweek" and "the work hours fluctuate from week to week and from day to day" (316 U. S., at 635; 331 U. S., at 21); and the contract here, as there, "carries out the intention of the Congress" (316 U. S., at 634).²³

In the present proceedings, as in Belo and Halliburton, the flexibility which Congress intended should be employed in applying the statutory mandate to the "infinite variety of compli-

²³ The intimation of the court below that the use of the term "overtime" to designate the non-scheduled periods and the rates payable for work during such periods was an innovation in the longshore industry contract of 1938 (R. 655-656) and, thus, indicative of an effort to evade the statutory mandate, is, as we have already noted (supra, note 8), wholly unwarranted. The term "overtime" had almost continuously been employed in the collective agreements, long prior to 1938, to denote longshore work during non-scheduled hours on "bulk cargo," including ballast and all coal cargoes (Defendants' Exhibit A). Its omission in references to work on "general cargo" is apparently of no significance. Moreover, since 1918, both the union and employer representatives, during their negotiations continually spoke of the non-scheduled hours as "overtime," and the award rendered by the National Adjustment Commission in 1919 so labeled them (R. 611).

cated industrial situations" (Kirschbaum Co. v. Walling, 316 U. S. at 523), marked by employment relationships "so various and unpredictable" (Walling v. A. H. Belo Corp., 316 U. S. 624, 634), should not be sacrificed to the Procrustean rigidity urged by respondents and imposed by the decision below."

²⁴ There are several decisions in the lower courts which are to the same effect as or to some degree in agreement with the decision below. We submit that such decisions, to the extent they are in accord, are erroneous. Ferrer v. Waterman Steamship Co., 70 F. Supp. 1 (D. C. Puerto Rico), involved longshore agreements governing the industry in Puerto Rico and reaches the same conclusion as the decision below. Roland Electrical Co. v. Black, 163 F. 2d 417 (C. C. A. 4). pending on petition for certiorari on another issue, sub nom. Black v. Roland Electrical Co., No. 340, so far as pertinent, held merely that "payments in excess of the amount required by the statute to an employee for work done in certain weeks do not relieve the employer from the obligation to compensate the employee for deficiencies in other weeks" (163 F. 2d., at 420); its conclusion that the time and one-half higher rate maintained for certain irregular periods of work did not constitute overtime compensation under the Fair Labor. Standards Act, but rather the "regular rate" for the periods to which it applied, relying on the ruling below (id., at 421, 422-423), seems to us obiter and unnecessary to the decision of the court; moreover, the higher rates in that suit, unlike those in the instant cases, "were not made or intended to be made as compensation for overtime work within the contemplation of the Act" (id., at 421, italics supplied). Cabunác v. National Terminals Corporation, 139 F. 2d 853 (C. C. A. 7), as already noted (supra, note 15), is distinguishable. from the present suits on the ground that a shift differential. of 10 cents rather than a punitive overtime rate was involved there; furthermore, the issue here mooted was only a subsidiary question in Cabunac.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the ruling of the court below should be reversed and the judgments of the trial court reinstated.

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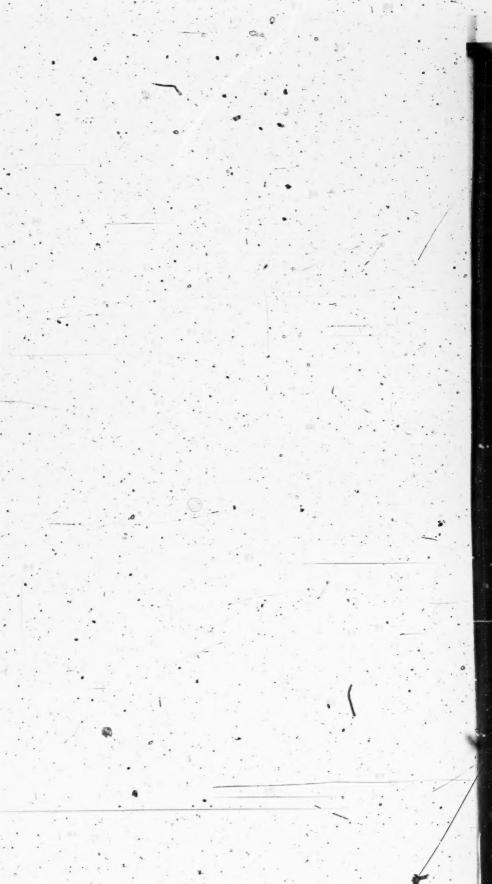
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Attorneys.

DECEMBER 1947.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 366

BAY RIDGE OPERATING Co., INC.,

Petitioner,

v

James Aaron, Albert Alston, James Philip Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel Tolbert.

No. 367

HURON STEVEDORING CORP.,

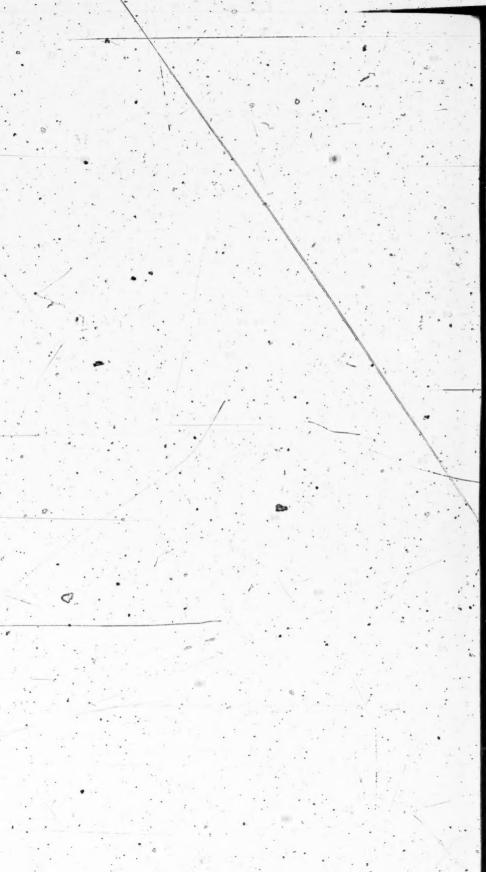
Petitioner,

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE and WHITFIELD TOPPIN.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the District Court (R. 581-591) is reported at 69 F. Supp. 956. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 654-659) is reported at 162 F. (2d) 665.

Jurisdiction

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

A collective bargaining agreement, executed after passage of the Fair Labor Standards Act, provided that:

- work performed from 8 a.m. to 12 Noon and from 1 p.m. to 5 p.m., Monday to Friday, inclusive, and from 8 a.m. to 12 Noon Saturday.
- (b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rates.' (Italics supplied.)

The "overtime" hourly rate was in most cases 150% of the "straight time" rate (Find. 9, R. 595).

Respondents performed 80% of their work during the so-called overtime hours at overtime rates. In fact, some respondents were specifically hired to work at night and never worked at all during "straight time" hours or at "straight time" rates (Chart, R. 613; also R. 176).

Under the circumstances were the "straight time" rates "the regular rate of pay" at which respondents were employed?

Statute Involved.

Section 7 (a) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, Sec. 7 (a), 52 Stat. 1063, 29 U. S. C. 207 (a)) provides, in part:

"No employer shall " " employ any of his employees who is engaged in commerce " " for a work-week longer than forty hours " " unless such employee receives compensation for his employment

o in excess of forty hours at a rate not less than one and one-half times the regular sate at which he is employed."

Statement

These two suits were brought for a number of plaintiffs under Section 7 (a) of the Fair Labor Standards Act (June 25, 1938, c. 676, Sec. 7 (a), 52 Stat. 1063, 29 U. S. C. 207 (a)) for overtime compensation earned by them as longshoremen in the Port of New York between October 24, 1938 and October 4, 1945 (R. 6, 13). By stipulations, the claims of the twenty respondents were severed from those of the other plaintiffs for immediate trial, and the other claims were left pending, to be controlled by the "legal rules and principles established by " "final disposition of the severed actions" (R. 2-3, 544-549, 592-593). It was also stipulated that respondents were engaged in commerce within the meaning of the Fair Labor Standards Act (R. 594).

This case is much simpler than the petition suggests. The statement therein refers freely to "the prevailing pattern in organized American industry", "shift differentials", statistical studies prepared by petitioners themselves and other matters which were not evidence. These economic data were received by the district court as "brief"

¹ The twenty claims selected for immediate trial were chosen as representing what was thought to be every possible combination of work pattern—with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time" and contract "overtime" periods. It is these twenty claims which were adjudicated by the Court below. It is difficult to understand why petitioners stipulated to abide by the determination of these claims if, as petitioners now assert, the claims were atypical.

material, rather than evidence" (R. 238-239). They were "strictly not testimony" (R. 438). Apparently the Circuit Court of Appeals felt that findings based on such argumentation had no evidentiary value, for in appending the findings of fact to its opinion (162 F. (2d) at 670 et seq.) the Court omitted all findings based on such non-evidentiary matter.

The facts of respondents' employment are relatively simple. Respondents worked for petitioners as longstoremen in excess of 40 hours in many weeks. For handling general cargo² respondents were paid \$1.25 for each hour worked between 8 a.m. and noon and between 1 p.m. and 5 p.m. Monday through Friday and between 8 a.m. and noon on Saturday. For all other time they were paid \$1.875 an hour. In all cases these rates were paid regardless of the number of hours worked in the day or week (Find. 42, R. 614).

Respondents did 80% of their work during so-calledovertime hours. Four of the twenty respondents never worked any "straight time". They worked "overtime" all of the time. One worked over 3,000 hours of "overtime" without one minute of "straight time". The details appear in the following chart (Find, 40, R. 613):

² For simplicity we state actual rates of pay only for handling general cargo. For four of seven other types of cargo handled however, the "overtime" rate was not 150% of the "straight time" rate (Find. 9, R. 595-597). Nor was additional compensation of 5 to 15 cents per hour for certain added responsibilities increased during "overtime" hours (Find. 11, R. 597-598).

•	Total Contract	Total Contract
	Straight Time	Overtime
Name	Hours	Hours
Huron		
Blue	252.	206.
Dixon		2,595.
Elliott		214.5
Fleetwood		951.
Fuller		230.5
Johnson, J. J		3,210.
McGee		2,598.5
Short		1,009.
Steele		1,747.5
Toppin	· ·	3,312.5
	/	
TOTAL HURON	2,926.5	16,074.5
Bay Ridge		
Aaron	52.	99.
Alston		850.
Brooks	28.	150.5
Carrington	298.5	344.5
Green	103.	576.5
Hendrix	. 44.	8.
Johnson A	204.	250.
Roper	_ 511.	1,158.
Stephens	0.	44.5
Tolbert		1,215.5
i i		
TOTAL BAY RIDGE.	. 2,274.5	4,696.5.
	===	
GRAND TOTAL	5,201.	20,771.

During most of the period in suit the petitioners required some longshore work around the clock, day in and day out (Find. 34, R. 610). When they worked around the clock, longshoremen found themselves at 8 a.m. working.

for \$1.25 an hour, the "straight time" rate, after having worked all night for \$1.87½, the "overtime" rate. A man who thus worked "straight time" after 40 hours of night work in a given week suffered an actual reduction in his hourly rate instead of the increase required by the Fair Labor Standards Act (Finds. 43 (c) and (d), R. 615).

One of the petitioners hired some gangs specifically and exclusively for work at "overtime" hours and "overtime" rates (Find. 34, R. 610; also R. 176). Men employed in these night gangs never worked for the day rates, which petitioners assert were their regular rates of pay (Find. 43 (b), R. 615).

Nevertheless, the district court held that the higher rates for night work were not regular rates, mainly because a collective bargaining agreement labeled them "overtime" (Opinion, R. 582-591).

Night work has been higher paid than day work in the longshore industry since at least 1887 (Find. 30, R. 608). Night longshore work is so hazardous and undesirable that some men, other than respondents, refused even in war time to work nights (Find. 27, R. 604). But the 1938 constract, after enactment of the Fair Labor Standards Act, was the first to label the less desirable, or night, hours as "overtime" (Finds. 31, 33, R. 609).

The 1938 contract provided:3

"3 (a) Straight time rate shall be paid for any work performed from 8 a.m. to 12 Noon and from

In wilful violation of the Act the stevedore contracts in the Port of New York during the period in suit provided a basic or straight time workweek of 44 hours, while since 1940 the Act has limited the non-overtime workweek to 40 hours. The stevedore contractors always insisted that the 40 hour week "was not applicable to the steamship industry" (R. 194).

1 p.m. to 5 p.m., Monday to Friday, inclusive, and from 8 a.m. to 12 Noon Saturday.

(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate." (Italics supplied.)

With a minor exception, however, no actual change in the manner of compensating longshoremen was made after passage of the Act from that which had prevailed for many years (Find. 33, R. 609-610).

While expressing concern lest it restrict the scope of collective bargaining, the District Court nevertheless found that:

"The 'basic working day' and the 'basic working week' referred to in the Collective Agreement were not the working day or working week normally, regularly or usually worked by plaintiffs during the period in suit" (Find. 45, R. 615).

This was the basis, as it should have been, for the Circuit Court's remand.

ARGUMENT

I.

On the essential issue in this case, this Court has already ruled adversely to petitioners' contentions, and the decision of the Second Circuit was not in conflict with any decision of this Court.

The present case is another involving a form of "split-day" plan for payment of wages to workers, such as this Court has already ruled illegal (notwithstanding its incorporation in a collective labor agreement) in Walling v.

Helmerich & Payne, Inc., 323 U. S. 37, 40-41. The various versions of such plans present no additional novel, substantial or important question for determination not previously resolved by that decision. Thus review was denied here in Walling v. Alaska Pacific Consolidated Mining Co., 152 F. (2d) 812, cert. den. 66 S. Ct. 960; Robertson v. Alaska Gold Mining Co., 157 F. (2d) 876, cert. den. 91 L. Ed. 1181. See also Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U. S. 419, 423-424; Walling v. Harnischfeger, 325 U. S. 427, 430-431.

At the last term of this Court the appropriate disposition of cases of this character was again made abundantly clear on two separate occasions. See 149 Madison Avenue Corp. v. Asselta, 331 U. S. 199, 205; of. Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17, 23. Referring in the latter to the earlier Helmerich & Payne decision, the Court said:

In those weeks in which an employee worked statutory overtime, he was paid at the contract 'overtime' rate for many straight-time hours and at the contract 'regular' rate for many overtime hours. Ohviously, these prescribed rates were not actual regular and overtime rates, although so named in the plan. Consequently, as in Overnight Motor Co. v. Missel, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked."

And in the 149 Madison Ave. case the Chief Justice repeated:

"The payment of 'overtime' compensation for nonovertime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the 'overtime' compensation is calculated.' In the instant case the lower court has found in these words (Find. 43 (b)-(d), R. 615):

- "[1] A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being 'overtime' hours, was paid the 'overtime' hourly rate of \$1.87½ an hour, for all hours both within and beyond 40.
- [2] A longshoreman who worked on general cargo 40 hours or more during 'overtime' hours, and also worked on Saturday from 8 a.m. to 12 noon during the same workweek, received \$1.87½, the 'overtime hourly rate', for the 'overtime' hours, and \$1.25, the 'straight time hourly rate', for the Saturday hours.
 - [3] A longshoreman who worked on general cargo for eight hours on Monday, from 8 a.m. to 5 p.m., and ten 'overtime' hours during each of the following four days and also on Saturdays from 8 a.m. to noon, received compensation at the 'straight time' rate for Monday and Saturday, and the 'overtime' rate for the other hours:
- [4] A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the 'overtime' classification, was paid the 'overtime hourly rate' of \$1.87½ per hour.''

How could the "regular rate" of pay for longshoremen who were specially hired for night duty have been the lower, or day-time, rate which they never received? As this Court observed in the *Harnischfeger* case, at pp. 430-431:

"To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent." (Italics supplied.)

Thus, the present case falls squarely within clearly indicated principles established by numerous decisions of this Court.

II.

There was no conflict between the Second Circuit's rejection of petitioners' contentions and the decision of any other Circuit Court of Appeals.

All the decisions in other Circuits on the issue here are in accord with the Second Circuit's decision. See Cabunac v. Natl. Terminats Corp., 139 F. (2d) 853 (C. C. A. 7th), affg. Intl. Longshoremen's Assn. v. Natl. Terminals Corp., 50 F. Supp. 26 (E. D. Wis.); Ferrer v. Waterman S. S. Corp., 70 F. Supp. 1 (D. P. R.), docket returned to the District Court on the Government's request during pendency of appeal in the First Circuit; Roland Electrical Co. v. Black, 7 W. H. Cases 167 (C. C. A. 4th, Aug. 12, 1947).

The Second Circuit, consistently with these decisions, has held that (1) the payments at "overtime" hourly rates pursuant to the longshore agreements were not overtime under the Act; (2) these payments were but the higher rates paid for hours normally and regularly worked at undesirable times of day and days of the week; (3) payments at these higher rates were payments at the employees "regular rate of pay" for such hours, within the meaning of Section 7.

III.

The Second Circuit, as directed in the earlier decisions of this Court, properly accorded weight to the Administrator's opinion that payments at the higher rate provided under the longshore agreements for work at undesirable hours are not overtime within the meaning of the Act.

As petitioner has conceded, the Administrator of the Wage and Hour Division "believes that * * the decision below is correct" (Pet., p. 25).

The trial court found here that there has been nothing

regular about the hours of work of longshore employees in the Port of New York and of the plaintiffs in particular (Find. 14-15, 598-599); that they have been called to work in gangs, days or nights, or carried from day work into night work, without regard to any regular or normal pattern but solely dependent upon the uncertainties of maritime, shipping and weather conditions and the character of ship and overland cargo arrivals, with the use of the "shape" as a shift hiring device (Find. 14, R. 598-599; Find. 19, R. 501; Find. 34, 36; R. 610); that they are required by their collective agreement to be available for work at any time of the day or night and Saturday afternoon, Sunday and holidays as they may be needed (Find. 20, R. 601); and that the so-called "basic working day". and "basic working week" established by the contract are fictions and "not the working day or working week normally, regularly and usually worked by plaintiffs" (Find. 45, R. 615).

These were the same considerations which led to the Administrator's opinion to the stevedore industry (Pl. Ex.

18, R. 559-561) that the so-called "overtime" rate established in the longshore agreements is "simply a higher rate of pay to the employee for working during inconvenient hours". The Second Circuit, in relying on the Administrator's opinions, which the trial court had ignored, followed the direction of this Court that such opinions are to be accorded appropriate weight. See Overnight Motor Transportation Co. v. Missel, 316 U. S. 572, 580, note 17; Skidmore v. Swift & Co., 323 U. S. 134, 139-140.

IV.

There is no occasion to review the decision of the Second Circuit here because of any particular importance or novelty of the question involved.

CONCLUSION

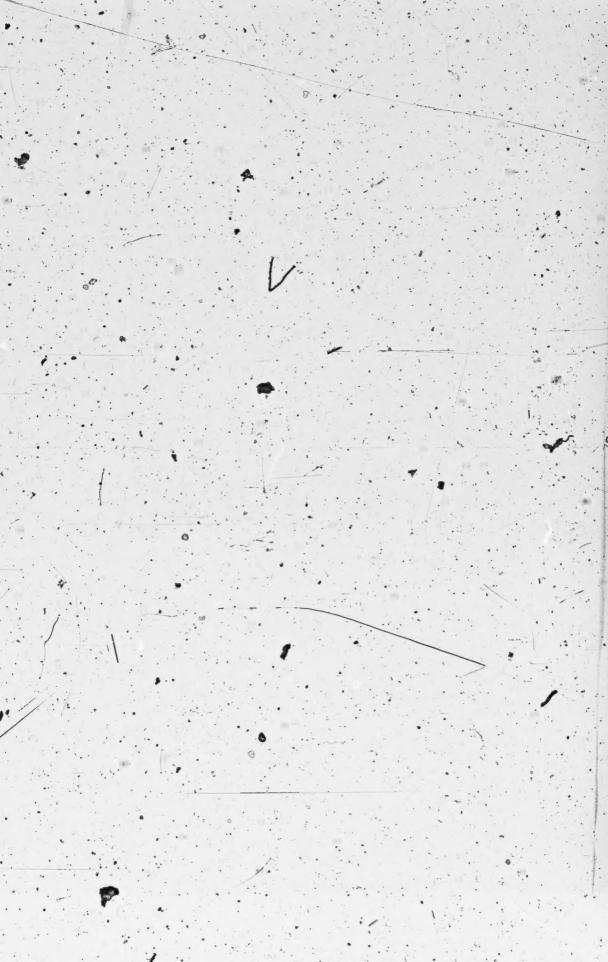
For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

MONROE GOLDWATER, Attorney for Respondents.

Max R. Simon, W. James L. Goldwater, Arnold G. Malkan, of Counsel.





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING Co., INC.,

Petitioner,

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS .
CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS and NATHANIEL TOLBERT.

No. 367

HURON STEVEDORING CORP.,

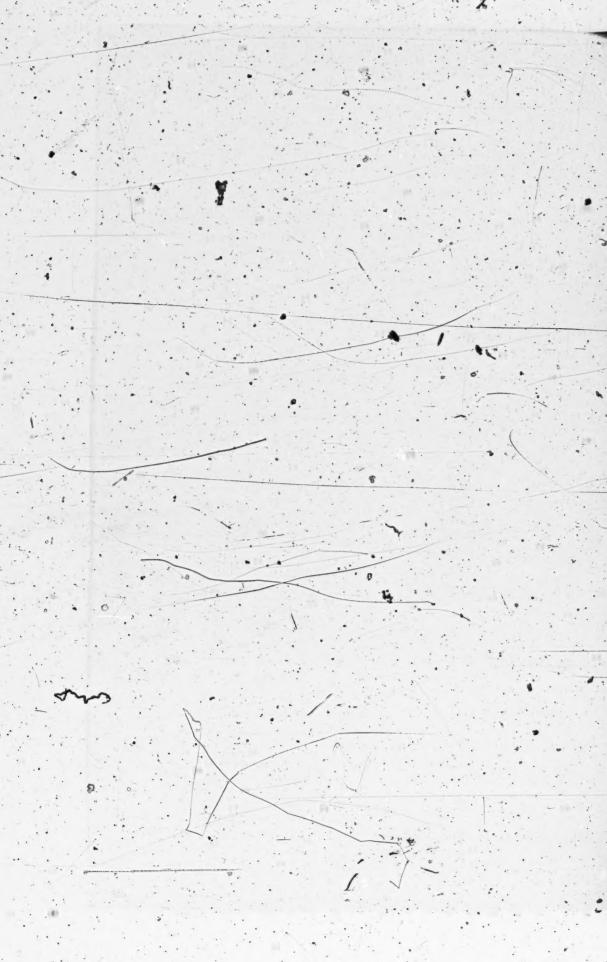
Petitioner,

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEET-WOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE and WHITFIELD TOPPIN.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

MONROE GOLDWATER,
MAX R. SIMON,
JAMES L. GOLDWATER,
Counsel for Respondents.



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IN THE.

Supreme Maurt of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING Co., INC.,

Petitioner,

James Aaron, Albert Alston, James Philip Brooks, Louis Carrington, Albert Green, James Hendrix, Austin Johnson, Carl I. Roper, Mars Stephens and Nathaniel Tolbert.

No. -367

HUBON STEVEDORING CORP.,

Petitioner,

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY
FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGee, Joseph Short, Alonzo E. Steele and
Whitfield Toppin.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below 👼

The spinion of the United States District Court for the Southern District of New York (R. 581,91) is reported at 69 F. Supp. 956. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 654-9) is reported at 162 F. (2d) 665. To its opinion the Circuit Court appended those findings of the District Court which it adopted as pertinent (R. 660-5).

Jurisdiction

Jurisdiction is invoked under Section 240 (a) of the Judicial-Code, as amended by the Act of February 13, 1925.

Nature of the Suits

These two actions, consolidated for purposes of trial (R. 17-8), were brought under Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Pub. 718, 75th Cong.; 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq.), referred to here as "the Act", to recover unpaid overtime compensation, together with an additional equal amount as liquidated damages, the costs of the actions and reasonable attorneys' fees. The actions were originally instituted by several hundred longshoremen against two stevedoring contractors for whom they worked at various times between 1943 and 1945, Bay Ridge Operating Co. Inc. and Huron Stevedoring Corp.; respectively, in behalf of themselves and other employees similarly situated (R. 4-14). By stipulation the class character of the actions was terminated and the caption amended to name as plaintiffs those who had elected prior to the trial to participate and be bound by the judgment (Pl. Exs. 1-4, R. 2a).

For purposes of simplifying trial and appeal procedure, the claims of ten claimants in each of the two actions were severed, as typical, from those of the other employees and tried separately (Pl. Exs. 5-6, R. 544-9). The other claims were left pending on the cocket of the

lower court, to be controlled by the "legal rules and principles established by final disposition of the severed actions" (R. 2-2a, 544-9, 592-3).

Statutory Provision Involved

Section 7 (a) of the Act provides as follows:

No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Question Presented

The essential issue here arises from the method of compensating longshoremen in the Port of New York, who load and discharge vessels moving in interstate and foreign commerce. Respondents were concededly within the coverage of the Act's overtime provisions in their employment by petitioners (find. 4-7, R. 593-4). The collective bargaining agreement between the International Longshoremen's Association, to which respondents belong, and the Deepwater Steamship Lines and Contracting

The twenty claims selected for immediate trial were chosen as representing what was thought to be every possible combination of work pattern, with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time and contract "overtime" periods. It is these twenty claims which were adjudicated by the trial court. It is distribution of these claims if, as they now assert, the claims were atypical (cf. Pet. Br., p. 5, note 3, pp. 45-7).

Stevedores of the Port of New York, including petitioners, in effect from October 1, 1943 to September 30, 1945, set up what the Circuit Court has termed (R. 655) "two sets of hourly rates" for work performed on various types of cargoes. One set was designated in the contract by the term "straight time" and the other by the term "overtime" (find. 8-10, R. 594-7). The agreement further provided that:

- 3 (a) Straight time rate shall be paid for any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday.
- (b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rates.

For general cargo the "straight time" hourly rate was \$1.25 and the "overtime" hourly rate was \$1.875 or 150% of the "straight time" rate (find. 9, R. 595).

Respondents performed 80% of their work during the so-called "overtime" hours at "overtime" rates. In fact, some of them were specifically hired to work at night and never worked at all during "straight time" hours or at "straight time" rates (find. 40, R. 613; Appendix, this brief).

Respondents have contended that the \$1.875 is not an overtime payment, but only another and different rate of

The somewhat higher rates paid for "straight time" and "over time" of "all other time", respectively, in handling obnoxious or dangerous cargoes of specified types did not always bear the relation of 100 and 150%. Following the trial court's holding that Section 7 was violated in this respect, the parties agreed upon the amount of recovery. The same is true of the "heading" differentials which were added in an identical amount to both "straight time" and "overtime" rates, so that the latter were less than 150% of the former (opin., R. 591; find. 9-12, R. 594-8; casel. 4-5, R. 617-8). For practical purposes the discussion may thus be limited to the general cargo rates, since petitioners have indicated that they have no quarrel with this result (Pet. Br., pp. 6-7, notes 6-7).

pay for work performed at certain times of day or on certain days of the week. Under this theory, respondents have urged, the total wages paid at all rates, including so-called "overtime" rates, must be divided by total hours worked to obtain the individual employee's "regular rate of pay" for the first 40 hours in the week, and 50% of that rate must be applied additionally to the hours in excess of 40, to comply with Section 7 of the Act. The trial judge recognized (R. 583) that:

There is a certain plausibility about plaintiff's case. For instance, in the case of an employee who worked only during the so-called "overtime" hours, it is true that he received compensation at so greater rate for the hours in excess of 40 than for the hours within 40. Such a result seems to fly in the face of the statute.

Nevertheless, the trial court concluded as a matter of law that "the "regular rate", which is the statute's measuring rod," had been "contractually established by the parties at \$1.25 an hour" for all purposes (R. 583; concl. 3, R. 617).

The Second Circuit reversed and unanimously accepted respondents' contention as consistent both with the guides previously established here and with the opinions of the Wage and Hour Administrator [162 F. (2d) 665]. The Grenit Court thus had no need to pass upon respondents' charge of error in the admission and exclusion of certain items of evidence.

³ Credit is concededly to be accorded in making this computation for the payments denominated "Wage and Hour Adjustment" here. Petitioners have failed to distinguish the payments of additional half-time compensation for Saturday morning work following forty straight time hours earlier the same week, payments not required under the contract, from contractual "overtime" (cf. Pet. Br., p. 23). In fact the former, as respondents concede, were true statutory overtime; paid on a weekly basis. See note 4, infra.

The issue is: was the contractual "straight time" rate the "regular rate of pay" at which respondents were employed? Or, put in another way, was compensation at the contract-designated "overtime" hourly rates payment at "not less than one and one-half times the regular rate of pay" at which these longshoremen were employed, as required under Section 7 of the Act?

The Trial and Nature of the Evidence.

The actions were tried without a jury on June 17, 20, 21, 24 and 25, 1946 (R. 2a). Respondents rested their prima facie case exclusively upon the introduction of stipulations relating to their employment and payment by the respective petitioners together with schedules showing the various rates at which they were employed; the hours which they worked, and the total compensation they received for the various weeks during the period in question (R. 20-4; Pl. Exs. 7-8, R. 550-8). From these schedules it appears that their employment was virtually limited to the years 1943-1945. No claim is made for the period after September 30, 1945 (R. 471).

Data sampled from the original payroll material for one selected week within the period in suit indicated, in the case of Bay Ridge employees, the exact time of starting and stopping during each work stint performed by each of the selected plaintiffs in the action against that company (Pl. Ex. 8). In the Huron case the number of hours worked by each of the selected plaintiffs at different times of day and on different days of the week was indicated as well as the rates paid for different types of cargo handled (Pl. Ex. 7). The schedules showed that the various respondents were employed at several different rates of pay varying within a week, and, with the exception of one circumstance of rare occurrence, received no added compensation at the end of each workweek for

An examination of respondents' employment record shows that their work followed no regular pattern. They worked varying numbers of days in different weeks. The number of hours worked on the days when they did work varied greatly. Many weeks they worked less than 40 hours; other weeks more than 40 hours. They handled a variety of cargoes, for which they were paid at varying rates; and some of them worked at various times as headers, gangwaymen, or assistant foremen during the hours designated in the collective agreement as "straight time" or "overtime", or both, indiscriminately. [Find. 21, R. 601; find. 41, R. 614.] During the period in suit the petitioners paid respondents the "straight time hourly rate" for work performed during the contract "straight time" hours and the "overtime hourly, rate" for work performed during the contract "overtime" hours, plus the customary "heading" differentials. These rates were paid by the petitioners regardless of whether respondents worked more or less than 40 hours a week, with a single rare exception (find. 42, R. 614) and regardless of whether they had actually worked in the "straight time" hours in the "basic working day" (Pet. Br., p. 14).

According to one of the stipulations covering Bay Ridge if, and only if, a plaintiff worked 40 hours between 8 a. m. and 12 noon and 1 p. m. and 5 p. m. Monday through Friday, inclusive, and then worked between 8 a.m. and 12 noon on Saturday of the week, he received additional compensation for work actually performed during the latter hours at 62½ cents per hour (Pl. Ex. 8, par. D, R. 557-8). There was an exception to this in the case of three plaintiffs in certain workweeks when they worked for Bay Ridge in New Haven, Conn. (R. 591; find. 43(a), R. 614-5) and there has been covery therefor (find. 47, R. 616; concl. 4-5, R. 617-8). The testimony indicated that the practice of the Huron Company was to pay the additional under the particular circumstances (R. 269-70). However, the occasion for such payments was, obviously, rare. See schedules, Pl. Exs. 7-8. Such additional payments were designated by the company on its payroll records as a "Wage and Hour Adjustment" (R. 558).

Petitioners, in resisting recovery, rested primarily upon the terms of the collective bargaining agreement establishing chronological, or what we may term "clock hour", limitations upon a so-called "basic working day" and a higher rate of compensation, coinciding mathematically with the familiar 150% of the rate paid during the basic working day, for "all other time"."

Petitioners were not content with the introduction of evidence relating to the various collective agreements going back through the years, the custom and understanding of "overtime" in the longshore industry, and the objectives and purposes of the contracting parties in consummating the 1943-1945 contract. Over respondents, objection that they were irrelevant, immaterial and not embraced within the issues they pressed the introduction of statistical analyses designed to show that the pattern of hours worked by longshoremen during the war years and in peacetime conditions, respectively, approached coincidence with the socalled "basic working day" established under the master contract (R. 28-3, 235-6; Def. Exs. D-F, J). These the trial court received and used as foundation for both decision and findings (opin. R. 590; find. 29, R. 606-8; find. 39, R. 612). Next, petitioners called upon expert witnesses to testify, as economic authorities, upon the concept of overtime as developed historically under collective agreements in American industry in general, and to express the view: that the "overtime" paid on the "clock hour" basis under the longshore agreement was "true overtime" as "industrially understood". 'Their testimony was largely directed to establish that a higher rate for work at a particular time of day had to be either a shift differential or "aver-

^{4a} Petitioners have suddenly taken to the use of the phrase "specifically scheduled hours" to denote what the contract terms the "basic working day" (Pet. Br., pp. 2-3, 9, 19-22, 31, 34, 49-51, 69). These hours were not "scheduled" for anyone, and the trial court has found that no one worked them (find. 14-5, R. 598-9; find. 40-1, R. 612-4; find. 45, R. 615).

time", and that the appropriate test was the amount of spread between the basic rate and the higher rate. Respondents' objections that such testimony was irrelevant and immaterial, and that in any event it lacked probative force in view of the clear indication of prior defense testimony as to the unique character of employment relations in the longshore industry, were brushed aside (R. 325-6, 331-4, 337-8, 419-20, 425-7, 433-6, 438). The trial judge both received and relied upon this line of proof (opin. R. 589-90; find. 28, R. 604-6; find. 39, R. 612).

As to the first of the statistical surveys, he had preliminarily observed:

"I will receive it for the narrow purposes which I have indicated. It is really brief material, rather than evidentiary material" (R. 29).

And the others were apparently received only "for the same limited purpose" (R. 29-30), that is, as brief data and "not evidence in the strict sense of the word" (R. 238-9). These surveys related to data compiled for the years 1923-7 and 1938-9 (Def. Exs. D-F), not contemporaneous with the period in suit except that the last, with which respondents were confronted for the first time upon the trial, covered 1944-5 data (R. 630-3, Def. Ex. J).

Being surprised by the presentation of the contemporaneous survey, respondents could not during the trial arrange for compilation of statistical data to meet its effect, but, as soon as the trial was completed, counsel prepared compilations from the rather limited data which petitioners had submitted in the form of records transcripts upon their examination before trial (R. 633). These statistics were made available as appendices to the brief respondents submitted to the lower court after the trial. Following the decision and judgment, respondents moved under Rule 59 (a) of the Federal Rules to open the record to admit this material, which they could not obtain in time for the trial, and under Rule 52 (b) to make certain additional findings based thereon (motion, R. 623-4, 625-7; affid. R. 629-30, 633-4 and tables 1, 3 and 4, exs. B-1, B-2, B-3, R. 640-2). Petitioners interposed no answering affidavit, but appeared in opposition, and the court defied the motion (R. 643).

As to the expert testimony, the court had cautioned counsel in chambers that it was "strictly not testimony" (R. 438). Yet it was nevertheless received, with this observation:

"I do not think he is testifying. I think he is arguing, and on the basis of the discussion I had with counsel in chambers I will allow it, by appointing him counsel pro haec vice or quasi-counsel" (R. 438).

Notwithstanding, the court denied admissibility to economic authorities presented by respondents in the form of statements in official publications of the United States Government characterizing the contractual "overtime" rate as a higher rate paid for particular hours of the day and days of the week and tending to refute the statistical and expert evidence submitted by the defense (R. 530-4; Pl. Exs. 15-17 for ident.). Defense counsel did not object to the photostatic form of the exhibits or to any failure of authentication, acknowledging the accuracy of the copies and the imprint, manifested by official seal, of the United States Government Printing Office (R. 532-4).

Further, it should be observed that the trial court accepted copies of letters written by the Wage and Hours Administrator, the Deputy Administrator and one of his Regional Directors, purporting to bear on interpretation of the Act under the circumstances at bar (R. 534-42; Pl. Exs. 18-19, R. 559-66; Def. Exs. N-O, R. 574-80). In this regard the court observed:

"As a matter of fact, I don't think it needs to be offered in evidence but I will receive it. If this were published in one of the regular publications of the

There was not available for offer at the trial in June, 1946

Wage and Hour Administrator • • it would be material which I could have access to • • • (R. 537).

an important opinion of the Administrator's office issued May 7, 1946, but not distributed officially to the field staff until July (R. 635). Respondents also made this interpretation available as an appendix to the brief submitted to the trial judge. In the motion for a new trial following the decision and judgment, they included a request that the record be reopened to receive this opinion (motion, R. 623-4; affid. R. 629-32 and ex. A, R. 635-9). Nevertheless, the court, without explanation, denied the motion (R. 643). And in fact, while giving weight to the personal views of Mr. Ryan, Prof. Taft and Dr. McCabe on the question at bar (R. 172, 337-8, 438, 583, 590) Judge Rifkind lend no consideration whatever, in either the opinion or the findings, to the interpretations of the Wage and Hour

Finally, in conjunction with the motion for a new trial, respondents moved under Rule 52 (b) to amend and correct the findings of fact by striking therefrom all findings based on not only the background of the collective agreement, the intention of the contracting parties and custom and practice in the longshore industry but also on the statistical surveys, the expert testimony, and the "understanding" in American industry generally as to the meaning of "overtime" (cf. finds. 8-12, 22-29, 37-39; R. 594-8, 601-8, 610-3). The ground recited was that these findings

Administrator.

were founded upon testimony and exhibits erroneously received in evidence and lines of proof erroneously permitted to be developed (motion, R. 623-4; affid. R. 6. 3-634). The motion was denied in total without comments (R. 43).

Summary of the Evidence

Respondents continue to urge that the criteria of shift differentials, the alleged prevailing pattern of American industry and portwide statistical surveys, together with the

background of the collective bargaining relationship, do not control in testing for compliance with Section 7 of the Fair Labor Standards Act (Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590; Jewell Ridge Corp. v. Local No. 6167, 325 U. S. 161; Walling v. Helmerich & Payne, 323 U. S. 37; Martino v. Michigan Window Cleaning Co., 327 U. S. 173; 149 Madison Ave. Corp. v. Asselta, 331 U. S. 199; Walling v. Harnishchfeger Corp., 325 U.S. 427), and that the only true test is the "actual fact" as to what respondents were paid. 149 Madison Ave. Corp. v. Asselta, 331 U. S. 199. But, in view of the fact that the trial judge predicated opinion and findings upon such non-evidentiary materials' and that petitioners still place principal reliance upon such elaborate rigmarole in seeking to reinstate the trial court's judgment (Pet. Br., pp. 10-13, 31-4 and notes, 35-7, 37-9, 43), it becomes important to look to the conditions under which longshore work is performed.

Since the trial court intimated that matters of general knowledge and economic data reported by recognized authorities need not have been developed in extenso upon the record, but may be nevertheless judicially noticed, or are subject to extrinsic reference by the court for advisory purposes, in considering the evidence we have referred not only to the testimony and the findings, but also to facts of common knowledge. The propriety of such recourse has been recognized by this Court in cases under the Act.

Apparently the Circuit Court felt that findings based upon such argumentation had no evidentiary value, for in appending the "pertinent findings" to its opinion [162 F. (2d) at 670, et seq.] it omitted those based on "non-evidentiary" matter (R. 660, et seq.).

^{8a} See with regard to judicial notice D. A. Schulte, Inc. v. Gangi, 328 U. S. 108 and, on the subject of appropriate reference to economic data as to operation of an industry generally, note the textual comments and footnote material in the opinions in A. H. Philips, Inc. v. Walling, 324 U. S. 490; Gemsco v. Walling, 324 U. S. 244; and United States v. Rosenwasser, 323 U. S. 360.

A.—General Conditions of Employment in the Longshore Industry*

Fundamental to an understanding of employment practices in the longshore industry is the fact that this is the most casual of all American industries. As recognized by one of the principal defense witnesses, "there is no regularity about the whole industry" (R. 69). This results primarily from the vagaries of shipping. As one Government authority has put it:

The longshoreman can get work only for the period the ship remains in port for the purpose of discharging or loading cargo. More ships in port mean more jobs for longshoremen; a storm delaying sea traffic means no work for the longshoremen during the delay, followed by a period of feverish activity in order to catch up with the work and enable the ship to sail on time. Ships may arrive and leave the port every day, some after a stay of only a day or two, others after a week or 10 days. Sometimes they straggle in one by one, and sometimes they come in numbers. Again, at certain seasons of the year there may be more ships and more cargo than at other seasons. All of these fluctuations in shipping affect the jobs of the long-shoremen.

Because of the unpredictable character of ship and cargo arrivals and the need to meet sailing schedules, the shipping companies and stevedores seldom know in advance how long the actual work of loading and discharging will last, or how many men they will need for this work. Hence, there has developed the practice of "hiring the longshoreman by the hour and hiring only when and where actually needed." Hand in hand with this has been the practice of

^{*}References to the findings are placed in brackets at the end of the paragraphs in this section to indicate that they cover generally the subject matter of the paragraph.

Boris Stern, Cargo Handling and Longshore Labor Conditions, U. S. Dept. of Labor, Bureaucof Labor Statistics, Bull. No. 550, p. 70; see also Charles P. Barnes, The Longshoreman, pp. 57, 169.

knocking off the longshore crews the moment odelay occurs which may tie up loading and unloading operations, in order to keep labor costs at a minimum. The longshoremen's employment "is on a more casual basis than the ordinary day-laborer's who, when he is hired, is at least assured of a day's work." [Find: 14-7, R. 598-600; find. 19, R. 601.]

Longshoremen have no way of knowing exactly when a ship will dock. There is no certainty of being taken on, nor is there any guarantee that the work will continue. When a ship arrives, which may be at any hour of the day or night, a small force of men is first hired to warp her in rig up the booms, open the hatches, set up the gear and otherwise make ready for discharging and loading cargo. After this is done more men are added until the work of discharging is completed and the loading begins "suddenly it may develop that not enough cargo has been assembled on the pier to occupy all the hands engaged, and the entire crew of longshoremen is dismissed until a day or two before sailing time when the men must work day and night to complete the loading and release the ship on scheduled time. These are the conditions of the longshore industry which deservedly place it at the head of the list of casual industries." The same result follows where a winch or boom breaks, adverse weather conditions set in, or any other set-back of a similar nature occurs, Under

front Labor Problem, p. 22. Since the steamship companies are customarily charged by the stevedoring contractors a rate per unit of freight handled, the latter require their foreman to keep costs with the most profitable limits (find. 22-3, R. 601-3). A saving of even few minutes' pay, where gangs totaling several hundred men are involved, may represent a considerable amount. Barnes, p. 57.

Barnes, p. 57.

Stern, p. 70. See also Barnes, pp. 57, 169; Stern, pp. 72-3.

Barnes, p. 57. "All these things affect the regularity of employment of longshoressen" (R. 767). So do fogs, tides and similar port factors (R. 80-2).

such circumstances men may wait around for hours without daring to leave to seek work elsewhere for fear of gaining the illwill of the hiring foreman, or losing the work should operations suddenly recommence. If a man should not be on hand at the appropriate time, his place would, of course, be taken by another. There is no regular weekly, or even daily, employment. [Find. 14-7, R, 598-600; find. 22, R, 604-5.]

The most continuous characteristic of longshore work is, thus, its irregularity, both of the employment and of its remuneration." Not only is a longshoreman uncertain when he will be hired, but he "has no guarantee of its extent or permanency once employment has been obtained. He may be discharged, just as he may be hired, at any hour." When he starts a particular work stint, he never knows how long it will last (R. 497, 523-4)." Thus, "the irregularity of the hours in beginning work is reflected in the uncertain periods of continuous employment" and "there is no greater certainty about the length of time the work will last than there is about the hours."14 In this respect the work pattern of a longshoreman is "entirely unique" (B. 69-70). He has "no regularity of employment in the sense that a factory worker may have (R. 35). [Find. 14-5, R. 598-9; find. 19, R. 601].

Because of the difficulty in getting a job and the uncertainty of its duration, the individual longshoreman will

¹⁰ Barnes, pp. 57, 169.

hours of employment in 367,271 man-weeks worked in a nine-month period shows an average workweek of but 19 hours (R. 315-6; Def. Ex. F). The reason for the relatively high rates of pay thus becomes apparent. See also Report of the Citizens Waterfront Committee, The New York Waterfront (1946), pp. 2, 11, 30, indicating average annual earnings in longshore labor in New York City in 1939 of \$900.

¹² Swanstrom, p. 32; see also Barnes, p. 169.

¹³ Stern, p. 70. ¹⁴ Barnes, p. 57.

remain on duty as long as his endurance will last, or the foreman permits him to remain. If the ship had freight waiting to be loaded and the hatch upon which a man was engaged was not fully loaded, a man might keep working at a stretch as long as he was "able to keep lifting" (R. 510). It was common for employees involved in this suit, starting work at 7 o'clock at night, to work straight through the night and then to continue working a considerable portion of the next day (R. 509, 515). There were even occasions when men worked around the clock, not only once, but twice, without stopping, except for one hour at meal periods, totaling a 48-hour stretch (R. 509). Such stretches of work, uninterrupted except for short meal periods, were not unknown even in peacetime operations in the Port of New York." [Find, 34, R. 610].

The system of hiring which pertains in the Port of New York has been variously described as "haphazard," "primitive" and "notorious." Longshoremen seeking work customarily gather outside the entrance to piers at three specified times of day pursuant to custom and collective agreement, at 7:55 a.m., 12:55 p.m. and 6:55 p.m., or at other times, as directed by the steamship company or the contracting stevedore, as for example where a vessel has been delayed, or cargo has failed to arrive. The

¹⁸ See work-record of Louis Carrington in employment by Bay Ridge, week ending April 2, 1944 (Pl. Ex. 8), for example.

¹⁶ Stern, pp. 72-3.

¹⁷ Swanstrom, p. 32.

^{**} Roy S. MacElwee and Thomas R. Taylor, Wharf Management, Stevedoring and Storage, p. 58.

Francisco, U. S. Works Progress Administration, National Research Project, Report No. L-2, p. 2.

²⁰ For the period in suit, see general carge agreement effective October 1, 1943, par. 8 (a): "Shaping time shall be at 7:55 a. m., 12:55 p. m., 6:55 p. m. Men may be ordered out, however, for any other hour." (Def. Ex. A).

³¹ Stern, p. 75.

men gather in the form of a "shape" or a semi-circle at the pier entrance and are selected by the stevedore foreman individually, or in gangs, for work at each hatch ready for loading on the particular vessel (R. 34). As each man or member of a specified gang is selected, he reports his name to the timekeeper and receives a brass check with a number in a series, which identifies him on the payroll records and the timekeeper's daily time sheets for that week. Where men have been selected individually, they are organized into gangs and put to work. Where the gang has been previously accustomed to work as a unit, it is assigned to a particular hatch or job (R. 36). A gang may hold together only for a few hours, or it may operate as a unit as long as there is work on the hatch; or on the ship, which may be for less than a day, for several days, or even more than one week.22 They may, as a group, work "very constantly" for one company, being hired recurrently at its piers (R. 45.6). However, the brass check number is retained for the entire single workweek, no matter how many hours are worked (R. 36-8), and surrendered when the man is paid the following payday." In this respect, the passing years have seen little change in hiring along the New York waterfront. The men shapeup today just as they did when collective bargaining relations began in the industry 30-odd years ago.24 [Find: 16-7. R. 599-6001.

Some stevedore foremen hire their men by the gang and endeavor to keep the men working as a unit whenever there is work for them (R. 45, 79-80). But no gang

for time put in and are apt not to be scheduled to work on regular shifts to any greater extent than the casuals. Their advantage rests in their having first preference for work." Keller, p. 2. See also Stern, p. 75.

²³ MacElwee, pp. 58-9; Stern, pp. 70-71, 75.

²⁴ Swanstrom, p. 26.

is employed regularly or permanently; the men work "only when there is work" (R. 460). Similarly, the practice has grown of posting notices of arrival on bulletin boards, of calling gangs working customarily as a unit to shape-up as their services are needed by prior notice posted at the pier (as in the case of Huron here) or of transmitting news of ship arrival or notification for gangs to report by word of mouth, increasingly by use of the telephone, from the stevedore foreman to the gang leaders or hatch bosses and from them, in turn, to the men (as in the case of Bay Ridge here). These practices in neither case vary the usual requirement that the men congregate at the shape-up at the customary specified times "irrespective of whether they have been working on that pier the day before, or even that very day." [Find. 17-8, R. 600-1].

Further, there is, of course, no definite system of informing the workers as to the exact time of arrival of a ship, or as to the readiness of cargo for loading, or the duration of the work, and they have, of course, no knowledge of how much cargo is to be handled, or how many men will be required for the work. It has been common to inform men called out to report and shape-up by gangs at the time of shaping up that either the ship or the cargo was not ready and that they should call back at a later hour (R. 42-3). In actual effect, the practice "practically all over the port" has been to stretch five or six such shape-ups, rather than the three called for by the collective agreement, and to pay the men only from the time when actually taken on and put to work (R. 497-9, 501-2). [Find. 16, R. 599-600].

The shape-up has been long deemed by those who have studied its effect "a system which has propagated favor-

²⁵ Stern, pp. 70, 75; Swanstrom, p. 25.

Stern, p. 77; Swanstrom, p. 25.

itism, bribery and demoralization." It is not our purpose here to advance social reform, but we point to the degree to which these evils exist only because, like the very institution of the shape-up itself, they increase the uncertainty and irregularity of the hours of work and of the days of the week upon which work may be obtained. Thus viewed, they offer additional evidence of the customary lack of regularity of the "basic working day," and the "basic working week". [Cf. find. 14, R. 598-9].

While efforts have been made in ports such as Seattle, San Francisco, Portland, Ore., and Los Angeles to "decasualize" longshore labor, as by the registration of longshoremen and hiring through union halls.28 nothing has been done to remedy the chaotic situation of hiring prevailing in the longshore industry in the Port of New York. In the view of one expert, "the fluctuations in demand from day to day are shown to be even more violent than the weekly fluctuations" and the division of the port into segments, together with its wide geographical extension, coinciding with the existence of shape-up at all piers at exactly the same hour, renders the situation "even more acute than is warranted in the fluctuations in the total demand for longshore labor." Furthermore, each employer, with a view to protecting his own needs subject to anticipated fluctuations, tends to create a reserve pool of labor, with sufficient margin for contingencies. At the

²⁷ Keller, p. 2. According to Father Swanstrom, "The system partly in vogue today of hiring by gangs contributes to its continuance." Swanstrom, p. 27. See also Stern, p. 72; and the recently released Report of The Citizens Waterfront Committee, titled *The New York Waterfront* (1946), pp. 2, 5, 27-8, 35-6: "Every ill... on the docks sustains itself through the shape-up... It is the badge of the casual employment of the longshoremen".

²⁸ Stern, pp. 75-6; Keller, p. 1ff@

²⁹ Stern, pp. 75-6.

³⁰ Stern, p. 72; see also Swanstrom, pp. 23, 36.

same time, "the men become habituated to seeking work from only the one employer, spasmodic and meager as the work may be." There is, in brief, "absolutely no relation between the demand for and the supply of labor in the longshore industry in the Port of New York."

To sum up, the effect of such factors the vagaries of shipping conditions, the action of the elements, the uncertainty of cargo arrivals, the institution of the shape-up, the practice of the "stand-by" and the "knock-off," the custom of payment by the hour, the existence of bribery and favoritism, the encouragement of a surplus labor supply, is to make certain that the contract-designated "basic working" day and week do not fix a longshoreman's "regular," "normal" or "usual" working hours. The only regular and normal condition is complete casualism. Work at any hour of the day or day of the week when he is called upon or when he finds it is the longshoreman's customary and usual lot.

B.—Historical Development of Hours and Rates of Pay in the Longshore Industry

The fact that the higher rates of pay prevailing for night and Sunday work on the New York waterfront grew out of the insistence of the longshoremen upon receiving increased pay for work at times when they would rather

⁸¹ Swanstrom, p. 23.

sopinion mentions Mr. Ryan's self-styled efforts to accelerate decasualization, as an effect of placing a higher rate on hight work (opin. R. 583, 588), there has been no finding of such tendency (cf. find. 27, R. 604; find. 39, R. 612) and it is belied by statements of all non-partisan authorities. Cf. Report of the Citizens Waterfront Committee, The New York Waterfront (1946), pp. 2-3, 18-22. As elsewhere, petitioners have here confused opinion with findings, as if there were no distinction (Pet. Br., pp. 25-6, 31). A "purpose" to decasualize, by avoiding "overtime" except where "essential", does not establish that decasualization has in fact followed as an effect (cf. find. 37, R. 610-1).

be at home with their families, notwithstanding the necessity of such work in view of the uncertainties of maritime conditions, is clear from a survey of the historical development of the higher differentials. The trial court found that

"Night work, Sunday work, work on Saturday afternoons and on certain legal Holidays, have been compensated at rates higher than the prevailing day rates in the longshore industry in the Port of New York at least as far back as 1887." (Find. 30, R. 608.)

A daily rate of pay prevailing for longshoremen in New York prior to the Civil War was replaced by an hourly rate in 1861.33 About 1863 the rate was fixed at 25¢, and in the instance of some companies or some piers at 30¢ per hour. Two or three years later a demand for 33¢ was granted, and about 1868, as a result of further agitation for increases, the rate generally paid was lifted to 40¢ per hour for both day and night work. But foremen took advantage of this uniform rate to do a great deal of night and Sunday work. The piers were small, and frucking and tiering could be carried on to greater advantage at night when there were no teams to interfere. The men protested against this and demanded a higher rate for working at these times. In 1872 this demand procured them 40 cents an hour for day work, an advance to 80 cents for night work and \$1.00 for Sundays.

Following the panic of 1873, a long depression set in and the immediate effect of the falling off in earnings and profits on the part of employers generally was to foster cuts in wage rates of their workers. Conditions among poor wage earners became desperate. Further, the New York merchants began to protest against the high cost of freight shipments.³⁵ This was the occasion for a cut in the

⁸⁸ Barnes, pp. 76-7.

³⁴ Barnes, pp. 77-8.

³⁸ Lois MacDonald, The Development of a National Lavor Organization, p. 408. Barnes, pp. 95-6.

longshore wage rates to 30¢ for day work and 45¢ for night work which the stavedore employers decided upon in 1874, of which they gave notice to their workers by newspaper publication. The workers, many of whom were then loosely knit together into a Longshoremen's Union Protective Association, struck against the proposed reduction. The men offered to compromise on retention of the 40¢ day rate and reduction of the night rate to 60¢ from 80¢, if the companies reinstated all the strikers. The strike eventually collapsed after five weeks and the companies imposed the rates upon which they had previously determined. The strike eventuals were upon which they had previously determined.

There were further reductions in wages along the North River resulting in strikes from time to time in the next few years. At some piers, the rates were put as low as 25¢ for day work and 35¢ for night work. On the East River and in Brooklyn a flat rate of 40¢ per hour was continued for day work, but the employers effected a saving in labor cost by reducing the former six men in the hold to four wherever the 40¢ rate applied,38 thus placing a greater burden of work on the men. These steps occasioned reaction here and there, culminating in a firm position about 1877 by different groups of longshoremen who refused to do night work, although ordered out, until the rate had been raised. Many vessels were delayed and the companies had so much difficulty getting men to wo ghts that they finally were compelled to restore, with more or less uniformity, the rate of 30¢ for days and 45¢ for night work which they had promulgated in 1874,30 .

³⁶ Swanstrom, p. 92; Barnes, pp. 95-6.

^{at} Swanstrom, p. 92; Barnes, pp. 77, 95-8.

³⁸ Barnes, p. 78.

Barnes, pp. 77-8, 98-9; Swanstrom, p. 92. Further difficulty was caused at this time by the 40¢ flat rate per hour prevailing in Brooklyn and on the Manhattan side of the East River for work chiefly on sailing vessels. These were rarely worked at night because long-shoremen would not work at night unless they were paid for it at a higher rate. Further, those in this work objected to payment at the North River rates when temporarily brought over to work on piers there. They would not work at night for a differential only 5¢ above their customary day rate. Barnes, pp. 79, 100.

It, thus appears that these rates for day and night work, respectively, and their accidental ultimate relationship of 150%, were not the result of collective bargaining by the men, but of unilateral action of the employers previously determined upon and formally announced and the "inability of the Union to hold out the men beyond a five week strike," which eventually "destroyed all faith in its strength"; "combined with this was the subsequent inability to get workers out at night without the addeded differential.

By 1879 a revival of trade unionism was in course under the impetus of the Knights of Labor movement and a revival of longshore unionism began in the Port of New York. Demand was made at different piers for 60¢ for night and Sunday work, and this came gradually to be granted in the next few years here and there through the port. At the time of shaping up, the men would decline to work at night unless they received a 30¢ bonus, making the rate 60¢. This was repeated at pier after pier, time after time, until the point had been won virtually throughout the waterfront.

In 1887 occurred the disastrous "Big Strike" led by the Knights of Labor, which tied up the whole New York waterfront. This movement of all the waterfront workers in the Port of New York started as a sympathetic reaction to efforts of employers in two unrelated operations in the harbor to reduce wage rates to the equivalent of 20ϕ per hour. The strike was a failure and resulted in lapse of the then prevailing practice of paying 60ϕ for night and Sunday and holiday work. On February 12, 1887, an agreement of the shipping managers reestablished the practice of paying 30ϕ per hour for day work and 45ϕ per hour

⁴⁰ Swanstrom, p. 92; Barnes, pp. 78, 98.

⁴¹ Barnes, pp. 78, 99-102.

for night work; *2 holiday pay was also reduced to 30¢ per hour. This 50% wage cut was unilaterally imposed on the demoralized workers. On the coastwise lines there was a general reduction at all piers to the 25-cent rate.*3

The rates remained the same until about 1898, when there was a rise from 30¢ to 45¢ for holidays as well as Sundays. About 1900 Sunday work was changed from 45¢ to 60¢ per hour. Meanwhile, however, the North River rates were by no means uniform throughout the Port of New York. Thus, the two principal German shipping lines paid at their piers in Hoboken 25¢ an hour flat with no extras. In June, 1900 they granted an advance of 10¢, paying 35¢ per hour on night work. In 1903 they raised the rates to 30¢ and 45¢ per hour, respectively, as in other parts of the port. At certain other piers rates such as 30¢ for day work and 40¢ for night and Sunday work persisted, however. In 1907 there was a strike for higher rates throughout the port, namely 40¢ for day work and 60¢ for night work and work on Sundays and holidays but the strike was lost and the old rates maintained; and some smaller employers who had advanced wages during the strike reduced them again to the former level."

In 1912 a joint council of the Longshoremen's Union Protective Association and the International Longshoremen's Association, through a wage committee, fequested an advance to 35¢ for day work and 50¢ for night work. The steamship companies agreed to pay 33¢ per hour from

⁴² Cf. Minutes of a Meeting of Managers of Steamship Lines trading with the Port of New York, held on Thursday, July 28th, 1887, at 11:30 o'clock, A. M., to "consider the questions arising out of the 'strike' of the 'Longshoremen for 60 cents per hour for "ght work" (Def. Ex. A). This self-serving declaration of the shipping managers is not in accord with the facts reported by Barnes, pp. 78, 102-8; Swanstrom, p. 92.

⁴³ Barnes, pp. 107-8, 79.

⁴⁴ Barnes, pp. 80, 111, 116-121.

7 A. M. to 6 P. M., and 50¢ from 7 P. M. to 6 A. M.; 60¢ for Sundays, Christmas and July 4th; and 50¢ for other holidays.

The unsuccessful strike of 1907 had been called by the Longshoremen's Union Protective Association, and during the succeeding years the dissatisfaction stemming from the failure of the strike, as well as the discord in the rank and file and antagonisms among the leaders, resulted in the organization of the International Longshoremen's Association which gradually absorbed the earlier union and has come to represent all of the waterfront workers in the Port of New York through the years.

Joseph P. Ryan, President of the International Longshoremen's Association, who entered longshore work in March of 1912 and was elected to his first union office in 1913 (R. 167-8) testified at the trial that the union's principal objective ever since has been "to have the work done in the day the as much as possible" (R. 173). According to Mr. Ryan: "We make the day rate as high as we possibly can get it and then make the night rate as high as possible" (R. 187).44 It is quite evident, moreover, that since the organization of the union on a permanent basis at the time of the first World War, there has been little to vary or change the original objectives of the longshore workers in taking collective action to better their rates of pay, as revealed by historical developments before the International Longshoremen's Association came into existence. The employers have found it difficult to get men to turn out for the

⁴⁵ Barnes, pp. 80-81.

⁴⁶ Swanstrom, pp. 91-2; Barnes, pp. 121-3.

the union's reason for having a 150% rate for all hours outside the basic work-day was to gain for its members the added income from the higher rate (R. 123). Another conceded that the men "felt they are entitled to more for night work" (R. 43).

night shape. Not infrequently they either do not show up at all or flatly refuse to work nights (find. 27, R. 604). It has been necessary, apparently, to continue the bait of a high night rate as well as to provide, under all the collective agreements in effect over a period of many years, that "men shall work any night of the week, or on Sundays, Holidays or Saturday afternoons, when required" (find. 20, R. 601).

Further evidence of the fact that the workers in the industry collectively, and the union in their behalf, have sought primarily to get each of the different rates "as high as possible" is indicated by the fact that the rates have frequently varied from the relationship of 150% as between day and night compensation as it existed in 1874. See comparison of the relationship of the two sets of rates for general cargo, from time of organization of the present union through the period in suit (find. 31, R. 608-9).

During the period from 1916 to 1918 the collective agreement specified one rate of pay for what was termed "day work" and a higher rate of pay for "night work", as well as a third rate of pay for Sundays and certain specified holidays. In 1918 the contract ceased to use the words "day" and "night" for the obvious reason that the triple rate system was dropped and the higher rate for work outside the basic working day was referred to as the rate for "all other time." This nomenclature continued down until 1938. There was no indication in the contracts through these years that the general cargo differential was other than a higher rate for night work (find. 31-2, R. 608-9).

In the fall of 1938, after enactment of the Fair Labor Standards Act, the rate payable during the customary daytime hours was for the first time referred to in the general cargo agreement as a "straight time rate"; and in the provision establishing the higher rate for "all other time" there was for the first time introduced, with reference to work at night, Saturday afternoons, Sundays and holidays, the words "shall be considered overtime and shall be paid for at the overtime rate." The collective parties, nevertheless, from the passage of the Act through the period in suit, made no actual change in the general manner of compensating longshoremen as compared with that prevailing previously, except for the rare circumstance of an employee working more than 40 "straight time" hours Monday through Friday and Saturday morning (find. 31-3, R. 608-10; find. 43(a), R. 614).

The "basic working week" remained at 44 hours per week from the 1921 collective agreement through the contract pertaining between October 1, 1943 and September, 1945, the period involved in this suit. Meanwhile the maximum workweek permissible under the Fair Labor Standards Act without payment of time and one-half overtime was 44 hours between October 24, 1938 and October 24, 1939, 42 hours between October 24, 1939 and October 24, 1940 and 40 hours subsequent to October 24, 1940. The workweek provided in the collective agreement was thus contrary to the paramount prevailing law of the land, as Mr. Ryan admitted. He added, however, that the union had always insisted in its negotiations upon a 40-hour week, but the employers refused to consider it and said "it was not applicable to the steamship industry" (R. 194-.5). The union's agreements have, theoretically, set up a "basic working day" and "basic working week" of 8 and 44 hours, respectively (Def. Ex. A). Notwithstanding, it is clear that these have not been the hours worked by longshoremen either normally, regularly or customarily (find. 14-5, R. 598-9; find. 19, R. 661; find. 35-6, R. 663; find. 40-1, R. 612-4; find. 45, R. 615).

The Fair Labor Standards Act was signed by the President June 25, 1938, to take effect 120 days later or October 24, 1938.

C.—Respondents' Pattern of Employment*

Perhaps more appropriate to determination of the cases at bar is a specific consideration of the working conditions and patterns of the 20 longshoremen who are respondents here. According to the President of the International Longshoremen's Association, when the United States entered the war many of the oldtime members of the union working at the Chelsea piers on the North River objected to extensive night work in which the stevedoring contractors desired them to participate (R. 175-6). In view of the generally short labor supply and the number of long-shoremen going into war work, together with this attitude on the part of the old-line dock workers, the employers said, according to Mr. Ryan:

"We will have to bring • • colored men in and work nights. • • Let them bring them in and let them work nights (R. 176)."

While it is clear that there had been some Negroes in longshore work for many years in the port of New York, it appears to have been extremely difficult for colored longshoremen to get work on shape-up in the daytime (R. 459, 461-2, 470, 480, 499-500, 520). Huron took on several colored gangs upon resumption of its operations in New York Harbor in 1944 following the elimination of the submarine menace, which had occasioned the transfer of the Grace Line's shipping activities to the Port of New Or-

^{*}References to the findings are placed in brackets at the end of the paragraphs in this section to indicate that they cover generally the subject matter of the paragraph.

of One of these piers was Furness-Withy Line, served by petitioner-Bay Ridge (R. 210-1, 175-6).

⁸¹ Several oldtimers who testified at the trial had been members of the union and had been engaged continuously in the industry for upwards of 25 or 30 years (R. 493, 514).

leans, and assigned some of these gangs exclusively to night work (R. 98, 486). Not only did they start working on night shift from the very time they were taken on, but the night when they commenced operations upon organization was a Sunday night (R. 456, 479, 487).

The Grace Line required a considerable amount of night work as well as work on Sundays and holidays even in normal times and during the period of the war the operation "was practically around the clock, day in and day out, except . Saturday/nights" (R. 100, 272). The company worked whatever hours "they needed to get ships They wanted to work all the hours possible" toward this end (R. 274). During the war, Huron carried 7 gangs working exclusively at night, and since the war there were, at the time of trial, still 5 to 7 gangs working at night only on Grace Line ships (R. 104, 460, 470). In addition, day gangs employed by Huron were switched to night work in regular rotation-2 gangs going on to night work exclusively for a period of one week and then back to days again and 2 other gangs going into night work the following week, in sequence. This was "regular" and not exceptional (R. 104, 470). Some plaintiffs in the Huron case worked exclusively by night, and others in day work and in night work, in rotation (Pl. Ex. 7). [Find. 34-5, R. 610; find. 40, R. 612-3; cf. find. 19-20, R. 601].

Plaintiffs employed by Bay Ridge worked both by day and by night (R. 497). With some the work was approxi-

Fort of New York, even in peacetime, which required regular night work by regular night crews (R. 504; find. 35, R. 610). The International Longshoremen's Association has never taken any formal action, by resolution or otherwise, in opposition to night work (R. 178).

by then reverted to "peacetime patterns" it appears reasonably clear, that the latter includes consistent night work by regular night gangs. Cf. find. 35, R. 610.

mately evenly divided; with others, the night work predominated but was commingled with periods when day work was performed within the same workweek (Pl. Ex. 8). Nevertheless, there has been no extensive period, according to one oldtimer, who came into the industry in 1908 and joined the union in 1916, when the colored men got regular day work for long stretches without shifts of night duty (R. 499-500). On the other hand, another veteran Negro longshoreman recalled working nights only, for 7 to 8 nights at a stretch without day work, quite frequently (R. 514-5). Another worked a stretch of 14 nights in a row without day work for Bay Ridge during the period in suit (R. 524). [Find. 34-5, R. 610; find. 40, R. 612-3; cf. find. 19-20, R. 601].

It is quite clear that these colored men would have preferred day work, if they "could get it and make enough money to live "because nights were made to rest and "be home with the family" and this was true, even though day work was compensated at a lower rate than night work (R. 486, 516, 523). Notwithstanding this preference, the men in order to earn a living were accustomed to "take whatever they were ordered to do" (R. 516).

Throughout the period in suit the men worked on Saturdays, Sundays and holidays whenever work was available to them, just as on any other day, and there was no less work available on those days than on any other day of the week (R. 516-7). As one oldtimer, with 38 years of experience in the port and a member of the union for 30 years, put it, a man would have to "look for a job Sunday morning as well as Monday morning." And the men would try to get work Sunday "the same as every other day in the week" (R. 499). A representative of the Huron Company conceded that "there was a considerable amount of Sunday work—there is no question about it" and the same was true as to holidays (R. 105, 271). When a ship entered the harbor on a Sunday it would, likely as not, start to load

or discharge that day (R. 467). Just as it was quite usual for men to start a job on a ship or hatch at night (R. 77), so it was quite usual for them start on a Saturday after-noon or Sunday night (first 34, R. 610). And there were some weeks in which Sanday, and Sunday night, was the only time when the men found work available (R. 456, 479; Pl. Ex. 7). In case of the regular night gangs employed by Huron, when they worked Saturdays, Sundays and holidays, their work was always at night (R. 472, 488)," and in the case of gangs working in the daytime with some rotation of night work, a substantial portion of their work on Saturdays, Sundays and holidays was night work. Analysis of the work records of the 10 selected plaintiffs in the Huron case shows that at least 65% of their work on Saturdays, Sundays and holidays was at night." [Find. 44. R. 615; find. 46, R. 606; cf. find. 19-20, R. 601; find. 34-5, R. 610].

Further indicating the fact that Saturdays, Sundays and holidays were worked by the men as normally as any other time of the week was the practice prevailing, when a loading job which was in process on Friday night was not completed that night and could not be completed Saturday morning, of calling the Friday night crew back Saturday night to finish it on the night shift, notwithstanding the collective agreement. The same was true of work in process on Saturday which was not completed that day, or by day gangs called out on Sunday; in such event, the night gangs would be summoned to continue with the job on Sunday night (R. 517). The stevedore contractors did not knock off the crews on Friday night or Saturday morning, as the case might be, and resume Monday morning, as would usually be the case with factory work; they kept the gangs working Saturdays and Sundays if the ship was still there and cargo remained (R. 517). They even undertook to penalize men who did not appear when their gangs were

³³ See also Pl. Ex. 7, par. 7 (R. 552) and employee work records.

⁵⁴ See table (R. 642) compiled from records, Pl. Ex. 7.

summoned for work on such days by denying them a full week's work (R. 472, 473-4, 488-9).

In the case of Huron the company organized gangs as required to meet the stress of shipping conditions (R. 485-6). The men were ordered to watch the bulletin board at the Grace Line pier daily, or to watch it When a ship for which they might be needed was expected; orders would go up at one o'clock in the afternoon calling out night crews required to work a shift that night (R. 461-2, 488). In some cases the stevedore contractor telephoned the hatch boss, or gang boss, to get together his gang for work at a certain time; the latter would then line up the men preliminarily at 5 o'clock and bring them down with him to the pier for the 6:55 P. M. shape-up (R. 486, 489-90).56 This would occur primarily when the company found that it was not getting sufficient labor on shape-up at the pier (R. 490-1). In any event, however, the men were hired only at the regular shape-up and this alone could determine whether an individual would be put to work, regardless of prior posting of notice or telephone summons, and regardless of whether he had previously performed work that day (R. 34-5, 461-2, 477). [Find. 36, R. 610; find. 18, R. 601].

With Bay Ridge, telephone notification to the particular gangs to report for work at a particular time was the customary practice (R. 494, 516). The company representative in charge of colored longshoremen would call the head foreman by telephone daily to advise what gangs would be needed at the various piers and indicate the time when

⁵⁵ One of the Huron employees reported that this happened to him twice after October 1, 1945, although on one occasion his wife was very sick and he had had to stay out to look after her (R. 473-4). Even before October 1, 1945, while there was no formalized practice of applying such penalty, the stevedore contractor would from time to time penalize the men in this fashion (R. 488-9).

⁵⁶ These men were all International Longshoremen's Association members (R. 492).

they should report at the shape-up. The head foremany then called the various gang bosses, who customarily maintained telephones in their home, or they would call him and pass the information on to the men (R. 494, 516). This usually occurred between 2 and 3 o'clock in the afternoon where work was to be performed by the gang that night (R. 516). Between 4 and 5 p. m. the individual long-shoremen would call the hatch boss on his home telephone and learn from him whether the gang was summoned to work that night (R. 516). Information as to gang's required to report on Sundays, and advice whether the gangs would report for day work or for night work, was transmitted by telephone in the same manner, at about 11 a. m. on Saturday (R. 499). [Find. 36, R. 610; find. 18, R. 601].

The stevedore foreman in charge of the colored group would sometimes call the secretary of the union local and the men would then through telephoning the union before 7 h. m. receive notification as to whether to report at the pight shape-up or to shape-up the next morning (R. 507, 521). Sometimes the men would be told on knocking off, for example at 6 a. m. following work on the night shift, to report back the same night (R. 496-7, 509). More commonly the pier foreman might advise the men to call for further orders. Such orders might call out the gang for day work or for night work, regardless of what they had previously worked. There was no way of telling whether such a call would result in work at all or, if it did, whether it would be day work or night work. As one man put it: "It was a miracle to know tonight where you would go tomorrow" (R. 509). The men usually working in Bay Ridge gangs, when receiving notification that work would be available at a specific pier, would still appear at the shape-up and be taken on at that time if they were to work at all (R. 594-5). . [Find. 18, R. 601; find. 36, R. 610].

It thus appears that the men were called to work in the case of both petitioners by notification transmitted in one manner or another by the stevedoring contractor, and the

company not only controlled, but determined in advance, the time of day and the day of the week when the particular gang was to be called (Pet. Br., p. 9; find. 16, R. 599-600). Only when the men found there was no work at the accustomed place did they try to get work at other piers, or to fill in or shape-up with other companies (R. 458-460, 507). There were times when the men were summoned to report to shape-up at a specified time and, when they arrived there, learned that the ship had not arrived, that there would be no work and that they would not be paid (R. 500, 505, 517-8, 521). This happened from time to time on both day and night work. When on day work a man might be told to report back at a later time; when on night work he was not (R. 522). [Find. 36, R. 610; find. 22, R. 604-5].

The trial judge ultimately found both that the pattern of work in the longshore industry is "completely unique" and that the hours of the "basic working day" as defined in the contract were not the hours normally, regularly or usually worked by the respondents (find. 14-5, R. 598-9; find. 41, R. 614; find. 45, R. 615). And this must inevitably have followed from an examination of their work pattern (Chart, find. 40, R. 613; see Appendix, this brief):

Name Huron	Total Contract 'Straight Time'' Hours	
11.00		
Blue	252.	206.
Dixon	8.	2,595.
Elliott	370.	214.5
Fleetwood	833.5	951.
Fuller	208.5	230.5
Johnson, J. J.	0.	3,210.
McGee	0.	2,598.5
Short	1,248.	1,009.
Steele		1,747.5
Toppin	6.5	3,312.5
TOTAL HUBON	2,926.5	16,074.5
		**

Name .	Total Contract 'Straight Time'' Hours	Total Contract "Overtime" Hours
Bay Ridge		
Aaron	52.	99.
Alston	318.5	850.
Brooks	98	150.5
Carrington	298.5	344.5
Green	103.	576.5
Hendrix	44.	8.
Johnson, A	204.	250.
Roper	511.	1,158.
Stephens	0.	44.5
Tolbert	715.5	1,215.5
TOTAL BAY RIDGE	2,274.5	4,696.5
TOTAL BOTH PETITIONERS	5,201.	20,771.

About 80% of respondents' work was thus during the contractual "overtime" period. Some of them worked nothing but contractual "overtime". One worked over 3000 hours of so-called "overtime" without a single minute of contractual "straight time". Sixteen of the twenty worked more "overtime" than "straight time".

Summary of Argument

It is respondents' position primarily that (1) under appropriate principles established by prior decisions of this court, payments at rates termed "overtime" in the long-shore agreements did not meet the overtime requirements of Section 7 of the Act, being attuned to "neither the purpose nor the mechanics" of the statute; but (2) such payments were necessary to induce longshoremen to accept employment at undesirable times of the day and days of the week under the circumstances of operation in a "unique industry"; and therefore (3) payments at these higher rates were payments at the employees "regular rate of pay"

for such hours, within the meaning of Section 7. This follows because (1) the "overtime hourly rates" were paid for work at specified times regardless of the number of hours previously worked in the day or week and without relation to excessivity of hours over any fixed number normally or regularly worked; (2) the longshoremen were paid at the contract "straight time" rate for many statutory overtime hours and at the contract "overtime" rate for many statutory straight time hours; (3) there was no increase in the employer's labor cost at the end of the 40-hour week upon the basis of compensation actually and ordinarily paid for nights, Sundays and holidays, which constitute normal, and not unusual, working time for long-shoremen.

Further, in accordance with the Administrator's interpretation, which is entitled to great weight, payments at the higher rates here for work customarily performed at undesirable times, outside the basic pattern of clock hours, are not properly, overtime within the meaning of the Act, regardless of contract designation. This is because (1) the principles established by the Administrator to determine where overtime payable pursuant to contract generally may be offset against that due under the Act are not fulfilled here, since the pay is not extra compensation for work outside normal and regular working hours; (2) he has specifically indicated his opinion that the higher rate payments under the prevailing pattern of agreements in the unique circumstances of operation in the longshore industry for working night or "off" hours are not true overtime under the Act; (3) in any event contractual "overtime" under the longshore agreements does not meet the appropriate standard of excessivity asserted by the Government and sustained by this Court in prior litigation.

As the petition here disclosed (Pet. p. 25), the Administrator believes that the Circuit Court, upon the facts found by the trial judge, gave "proper consideration" to his

interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct". Since the filing of the petition the Administrator has made known his reasoning: night "overtime" under the longshore contracts cannot be statutory overtime within the Act's intendment "because it is payable to an employee who comes to work at 5 o'clock, even though he has performed no work previously on that date". And as to Saturday afternoon, Sunday and holiday "overtime" here, the Circuit Court's holding was correct in view of the findings below (R. 658-9). Accordingly, the Second Circuit's judgment should be in all respects upheld.

In no event, finally, may the trial court's judgment be reinstated, since substantial error was committed in various rulings on the evidence. If reversal should by any chance be ordered, retrial should follow. (See discussion, pp. 8-11, supra.)

ARGUMENT

Under appropriate principles established by prior decisions of this Court, payments at rates termed "overtime" in the longshore agreements did not meet the statutory requirements of Section 7 of the Act.

The overtime provision in Section 7 of the Fair Labor Standards Act is drawn in clear and unequivocal terms. It forbids any employer to employ any worker within its scope for more than 40 hours "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." The language used indicates a design (1) to proscribe overtime absolutely unless the requisite additional compensation be paid for any excess over the limited workweek, and (2) to

require the additional compensation to be paid at 150% of the regular rate. Section 7 (a) does not use the word "overtime", but rather the term "excess". Petitioners construction, which the trial court accepted,—that "overtime" as defined in a collective agreement solely in terms of work at undesirable hours outside a specified clock pattern, without reference to excessivity of the hours worked over a particular number normally or regularly worked by the employee, may comply with Section 7—does violence to both the statutory language and the statutory purpose.

This Court has now several times indicated that the basis for computing and paying overtime under Section 7 must be consistent with the congressional purpose: (1) to spread employment by inducing reduction of the workweek through the placing of a severe penalty upon all work over 40 hours per week; (2) to compensate employees for the burden of hours in excess of the Act's maximum standard. See Overnight Motor Transport. Co. v. Missel, 316 U. S. 572, 577-578; Walling v. Helmerich & Payne, Inc., 323 U. S. 37, 40; Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U. S. 419, 423-4; Jewell Ridge Coal Corp. v. Local 6167, 325 U. S. 161, 167. And the President's message of November 15, 1937, calling for the enactment of this type of legislation referred to protection from "excessive hours" and "the evil of overwork". See 316 U. S. 572, 578. Thus, in addition to the two principal elements, the statute was also designed to effect "a reduction in hours . . to maintain health". Southland Co. v. Bayley, 319 U. S. 44, 48.

It is now several years since this Court in the Helmerich & Payne case first rejected a "split day plan" whereby a basic hourly rate was paid for the first 4 or 5 hours worked each day, the weekly total of such hours not exceeding 40, and the remaining hours worked were compensated, in accordance with a collective bargaining agreement, at one and one-half times the contractual base rate.

The employees there regularly worked 8, 10 and 12 hour daily shifts which, under the employment contracts, were divided into two parts, to which "regular" and "overtime" rates, respectively, applied. The first 4 hours of each 8 hour tour, and the first 5 hours of each 10 or 12 hour tour, were assigned a specific hourly "base or regular rate" and the rest were termed "overtime" under the agreement and compensated for at one and one-half times the "base or regular rate". As the Court observed, in holding this plan to be inadequate compliance with the overtime provision of the Act:

Section 7(a) limits to 40 a week the number of hours that an employer may employ any of his empioyees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate "not less than one and one-half times the regular rate at which he is employed." The split-day plan here in issue satisfies neither the purpose nor the mechanics of this requirement . It enabled respondent to avoid paying real overtime wages for at least the first 40 hours worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment. And the plan was. so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one half times the actual regular rate [323 U. S. 37, 40].

The Court noted also a separate reason for concluding that the "split day plan" did not comply with the Act's overtime requirements: the "overtime" paid was not realistically based upon the hourly rate of compensation "actually paid for ordinary non-overtime hours". That is, in determining the regular rate, the employer did not look to the compensation normally and regularly paid the workers for the "first 40 hours actually and regularly worked." The Court's reasoning on this point was as follows:

The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by § (a). While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. To compute this regular rate for respondent's employees, assuming the same wages and tours, required only the simple process of dividing the wages received for each tour by the number of hours in that tour. This regular rate was then applicable to the first 40 hours regularly worked on the tours and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40.

But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked • • . Thus when an employee on regular eight hour tours had actually worked 40 hours, respondent could point to the employee's contract and claim that he had worked only 20 "regular" hours and 20 "overtime" hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours [323 U. S. 37, 40-1].

The Youngerman-Reynolds case indicates that compliance with Section 7 requires an addition to wages in the requisite amount after the 40-hour point has been passed in the workweek:

Under § 7(a) an employer is required to compensate his employees for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed. Thus by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, § 7(a) achieves its dual purpose of inducing the employer to reduce the hours

of work and to employ more men and of compensating the employees for the burden of a long workweek (Emphasis supplied) [325 U. S. 419, 423-4].

In Walling v. Harnischfeger, 325 U. S. 427, employees were compensated pursuant to a collective bargaining agreement under which they were paid a basic hourly rate which by the terms of the agreement was to be considered the "regular rate," and in addition received incentive bonuses varying with the output, or when assigned to "non-incentive" work, an addition of at least 20% of the basic hourly rate. They were held underpaid nevertheless under Section 7 since their time and one-half was based only upon the base rate. Declining to accept the designation of the "regular rate" made in the agreement, the Court commented:

Those who receive hourly rates at least 20% higher than their guaranteed base rates clearly are paid a regular rate identical with the higher rate and the failure of respondent to pay them for overtime labor on the basis of such a rate is a plain violation of the terms and spirit of § 7(a). No contract designation of the base rate as the "regular rate" can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of § 7(a), are impossible of achievement under such a computation [325 U. S. 427, 430].

Note also the late Chief Justice's reaffirmation, in dissenting there, of his earlier approval of the Helmerich & Payne decision:

In the Helmerich & Payne case, no attempt was made by the employer to apply the asserted regular hourly rate to the first forty hours of the workweek, the actual wage paid being greater. In consequence, the overtime wage was less than one and one-half times the hourly wage in fact paid during the first forty hours of the workweek. This was an obvious failure to comply with overtime pay requirements of the statute [325 U. S. 427, 441].

The indication thus is that contractual payments designated by the parties as "overtime" satisfy the requirements of Section 7 of the Act only if marked by payment of increased compensation for excessivity of hours over a given number normally or regularly worked by the em-. ployee. 'Measured by that test, contractual "overtime" under the longshore agreements "satisfies neither the purpose nor the mechanics" of the statutory requirement: (1) it enabled petitioners to avoid paying any real penalty, regardless of the number of hours previously worked in the day or week, with no upward limit whatever; (2) it could thus have had no possible effect upon reducing hours or spreading employment; (3) it failed to compensate employees, for hours worked in excess of the first 40, at 150% of the rates "actually paid for ordinary, non-overtime hours". On the contrary, there was no increase in labor cost following 40 hours of work and no premium for the burden of excessive hours beyond that normally paid without the excess. The Court's earlier decisions standing alone would thus appear to foreclose the reliance sought to be placed upon the "contractual nomenclature" here.

Further than that, however, the present Chief Justice less than a year ago, in Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17, reaffirmed the effect of the holding in the Helmerich & Payne case and stated the applicable doctrine as follows:

In those weeks in which an employee worked statutory overtime, he was paid at the contract "overtime" rate for many straight-time hours and at the contract "regular" rate for many overtime hours. Obviously, these prescribed rates were not actual regular and overtime rates, although so named in the plan. Con-

sequently, as in Overnight Motor Co. v. Missel, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked [331 U.S. 17, 23].

In the instant case the trial court has found (find. 43 (b)-(d), R. 615):

- [1] A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being "overtime" hours, was paid the "overtime" hourly rate of \$1.8712 an hour, for all hours both within and beyond 40.
- [2] A longshoreman who worked on general cargo 40 hours or more during "overtime" hours, and also worked on Saturday from 8 a. m. to 12 noon during the same workweek, received \$1.87½, the "overtime hourly rate", for the "overtime" hours, and \$1.25, the "straight time hourly rate", for the Saturday hours.
- [3] A longshoreman who worked on general cargo for eight hours on Monday, from 8 a. m. to 5 p. m., and ten "overtime" hours during each of the following four days and also on Saturdays from 8 a. m. to noon, received compensation at the "straight time" rate for Monday and Saturday, and the "overtime" rate for the other hours.
- [4] A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the "overtime" classification, was paid the "overtime hourly rate" of \$1.87½ per hour.

In other words, here, too, respondents, in weeks in which they worked statutory overtime, "were paid at the contract 'overtime' rate for many straight time hours and at the contract 'regular' rate for many overtime hours". Even petitioners have recognized (Pet. Br., p. 14) that the higher rates were paid "regardless of whether respondents had worked more or less than a total of 8 hours in any one day

or 40 hours during the week"; they normally received no addition to the contractual rates regardless of how many hours they worked daily or weekly. Here too it must thus be concluded that their "prescribed rates were not the actual regular and overtime rates", although so termed in the collective agreement.

"Split day plans" which, pursuant to collective agreement, divided the working day into 6 hours of "regular" time and 2 hours of "overtime", and 7 hours of "regular" time and 1 hour of "overtime", respectively; have for like reasons been held inadequate compliance with Section 7 of the Act. Walling v. Alaska Pacific Consolidated Mining Co., 152 F. (2d) 812, cert. den. 66 S. Ct. 960; Robertson v. Alaska Gold Mining Co., 157 F. (2d) 876, cert. granted for purpose of modifying Circuit Court judgment on remand, 67 S. Ct. 1728. In the Robertson case, this result was reached notwithstanding the fact that a certified labor union representing the employees had insisted upon the form of agreement in effect, the Ninth Circuit noting that, under a "split day" contract, the "overtime-rate is not compensation for true overtime, that is, hours worked in excess of the normal work week or work day". See also Roland Electrical Co. v. Black, 163 F. (2d) 417, now pending on petition for certiorari-to the Fourth Circuit on another issue (No. 340).

The precise issue here, involving longshore contracts of the familiar "clock hour" type covering stevedoring operations on the Great Lakes, was several years ago passed upon favorably to respondents' contention by the Seventh Circuit. In Cabunac v. Natl. Terminals Corp., 139 F. (2d) . 853, affg. Intl. Longshoremen's Assn. v. Natl. Terminals Corp., 50 F. Supp. 26 (E. D. Wis.), Circuit Judge Minton

basis, in the making of the so-called "Wage and Hour Adjustment", petitioners revealed that they well understood, when they chose to, the Act's concept of overtime. See notes 3a-4 supra.

observed:55

It seems evident to us, as it did to the District Court, that the "overtime" rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workman's standpoint, and that this rate is the "regular rate" to be paid for work on the night shift, on Sundays, and on certain holidays, within the meaning of the Fair Labor Standards Act.

As the Second Circuit observed below, the Great Lakes decisions involved "substantially similar collective bargaining agreements and . . . facts in many respects the same" as those at bar (R. 657). The same result was reached more recently in a test case in Puerto Rico in which transcripts of the expert testimony in the cases at bar, similar trial techniques and identical arguments were advanced by the Government. In Ferrer v. Waterman S. S. Corp., 70 F. Supp. 1 (D.R. R.) the court rejected the legal contentions which Judge Rifkind accepted on trial here, holding that rates for "extraordinary" or "overtime" hours, nights, Sundays and holidays, under the Puerto Rican longshore agreements, constituted merely "a series of regular or basic rates which fluctuated according to the time of day and cargo handled, and bore no relation to hours worked in excess of forty't, hence could not be overtime in accord with Section 7.50 See also Roland Electrical Co. v. Black, 163 F. (2d) 417 (C. C. A. 4).

Duffy, who rendered the opinion in the lower court, and Judge Minton, who rendered the Circuit Court's opinion, were members of the United States Senate at the time when the Fair Labor Standards Act passed that body.

The Government, in its brief to the Special Master preceding Judge Cooper's decision in the Ferrer case, said: "The collective bargaining agreements in this case follow a pattern obtaining generally on all the waterfronts of the United States and the decision in this case will be largely controlling of claims pending, or likely to be prosecuted, in all parts of the country" [Br. p. 18]. The docket in that case was returned to the District Court on the Government's request, during pendency of appeal in the First Circuit, while the cases at bar were before the Second Circuit.

It follows, in keeping with the principles established by prior decisions of this Court, as well as lesser courts which have passed on similar longshore agreements elsewhere, that (1) the payments at the 'overtime hourly rate' pursuant to the agreements were not overtime under the Act; (2) these payments were but the higher rates paid long-shoremen for hours normally and customarily worked at undesirable times of day and days of the week; (3) prements at these higher rates were payments at the employees' "regular rate of pay" for such hours, within the meaning of Section 7.00

II

According to the Administrator's interpretation, which is entitled to great weight, payments at a higher rate under the lengshore agreements for work at undesirable hours outside a basic clock pattern are not overtime within the meaning of the Act.

The trial court accepted the contractual designation as "overtime" of all work outside a specified period of clock hours and permitted offset of the payments at the higher rates against overtime due on a 40-hour basis under the Act. In so determining the court did not specifically reject, but entirely ignored, the Administrator's expressions of opinion on the issue here, which this court has held are entitled to great weight. Overnight Motor Transportation Co. v. Missel, 316 U. S. 572, 580, note 17; Skidmore v. Swift

dence that the higher rates evolved to induce workmen to turn out at undesirable times when longshore operations were necessary, and that the 150% relationship of "overtime" to "straight time" was accidental, in a unique industry. This brief, pp. 20-27, supra. Findings based upon what the trial court received as argument, not evidentiary matter, should not foreclose recourse to recognized authorities for the correct historical facts. Cf. this brief, pp. 8-11, supra and p. 62, infra.

d Co., 323 U.S. 134, 139-140. Petitioners' brief here has likewise ignored the Administrator's, position, but the petition took cognizance of sit.

The Second Circuit, in reversing, gave consideration to "the administrative interpretations" and observed that they "suggest no conclusion different from ours" (R. 658). "Indeed" said Judge Frank, "they support plaintiffs' contentions," (R. 658, note 7); and he referred to the Administrator's opinion set out in one of the interpretative bulletins published for guidance of the public, as follows:

The question has been asked as to what are requirements of section 7 in cases where a union agreement * * calls for the payment of overtime or other special compensation which is not required to be paid by the act. Extra compensation paid for overtime work, even if required to be paid by a union agreement . . need not be included in determining the employee's regular hourly rate of pay. . Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation-over and above straight time paid by him as compensation for overtime work-that is, for hours worked outside the normal or regular working hours-regardless of whether he is required to pay such compensation by a union or other agreement. In no week, of course, will the overtime requirements of Section 7 be met unless the employee receives an amount equal to at least his regular rate of pay for 40 hours and time and one-half such rate for the hours worked in excess of 40. It should be noted, however, that the Act does not supersede provisions of a collective bargaining agreement or other agreement between an employer and his employees which set standards higher than those set in the act; which, for example, require the employer to

⁶¹U. S. Department of Labor, Wage and Hour Division, Interpretative Bulletin No. 4, par. 69, Wage & Hour Manual (1944-45 Cum. Ed.), p. 167.

pay time and a half for all hours worked in excess of 8 hours a day regardless of how many hours in the aggregate the employee may work in a week.

From the words as originally italicized in the opinion, it is clear that the compensation is for true overtime work within the statutory intendment only if "for hours worked outside the normal or regular working hours," and the examples as given immediately thereafter speak purely in terms of excessivity, being related to such standards as "All Hours Worked in Excess of 40, the Regular Weekly Number of Hours Fixed in the Agreement" and "All Hours Worked in Excess of 8 Hours, the Normal or Regular Workday."

In a later opinion amplifying the interpretation on this point, the Assistant Solicitor of Labor, speaking for the Administrator, stated:

In making a determination as to whether an employee is receiving overtime compensation or is being paid at a higher rate, there are two factors to consider; namely, the hours of work which are being compensated for and the understanding of the parties as to the nature of the compensation. Extra compensation may be considered as overtime compensation only if the following conditions exist:

- 1. The hours compensated for must be hours not normally worked by the employee; for example, work on Sundays, holidays, or at a time of the day when the employee does not normally work.
- 2. It must clearly appear from the agreement of employment that the payment of extra compensation is overtime compensation for such hours and is not merely a higher rate of pay.

If these two conditions are not met, the employer may not regard the extra compensation as discharging

⁶² Interpretative Bulletin No. 4, par. 70, cases (1) and (3).

⁶³ Opinion reported in Wage & Hour Manual (1944-45 Cum. Ed.), p. 227, cited approvingly by the Second Circuit here (R. 658-9).

all or any part of his obligations under Section 7 of the Act. In such a case, the employee must be treated as working at several different rates of pay during the week. (Emphasis supplied)."

It is perfectly clear from the evidence in the two cases at bar that it was normal and usual for Huron and Bay Ridge longshoremen to work nights and on Saturday afternoons, Sundays and holidays, and such was the common practice of both petitioners and respondents here. It is just as clear from more specific opinions of the Administrator that payment at the higher rate for night work in the longshore industry is not overtime, but merely an increased rate actually paid to men who work at an inconvenient and undesirable time of day, in an industry where unique circumstances dictate such an inducement as an essential of operation. See Cabunac v. Natl. Terminals Corp., 139 F. (2d) 853 (C. C. A. 7).

The trial court has in fact found that petitioners required longshore work "practically around the clock, day in and day out, except Saturday nights" (find. 34, R. 610). One petitioner employed gangs "exclusively on night work"; the other assigned its gangs "either to day or night work as shipping exigencies required"; and "the gangs frequently commingled day work with night work on different days in the same working week" (find. 34, R. 610). Obviously the men were called to work in gangs, days or nights, or carried from day work into night work, dependent solely upon "the uncertainties of maritime, shipping and weather conditions, and the unpredictable character of ship and overland cargo arrivals, and the

of collective agreements with dual rates, for different times of day and days of the week, closely resembling the Great Lakes longshore contracts. Wage & Hour Manual (1944-45 Cum. Ed.), p. 227. Cf. I.I.A. v. Nat'l Terminals Corp., 50 F. Supp. 26 (E. D. Wis.); Pl. Ex. 18 (R. 559-61).

⁶⁵ See chart (find. 40, R. 613); set out in Appendix, this brief; affid., motion for new trial, tables 34, exs. B-2 and B-3 (R. 641-2). See also discussion of evidence above pp. 28-35, supra.

use of the 'shape' as a hiring device" (find. 14, R. 598-9; see also find. 19, R. 601; finds. 34, 36, R. 610). The men were, under their collective agreement, "obligated to work any night of the week or on Sundays, holidays or Saturday afternoons, when directed" (find. 20, R. 601). It was "not unusual" for them to start their work on a ship at night, or on Saturday afternoon or Sunday (find 46, R. 616). And the so-called "basic working day" and "basic working week" established by the contract were "not the working day or working week, normally, regularly or usually worked by plaintiffs" (find. 45, R. 615) or other longshoremen (find. 35, R. 610).

These were the same considerations which led to the Administrator's opinion that, because of the "vagaries of the stevedoring business" which "may require an employee to work any hour of the day or night," extra compensation paid for hours outside the "basic working day" as established by collective agreement in that industry, although contractually defined as "overtime", is not overtime within the meaning of the Act. The Administrator accordingly took the position that the so-called "overtime" rate established in the longshore agreements is "simply a higher rate of pay to the employee for working during inconvenient hours".

The Administrator's view is obviously that of the Cleveland Stevedore opinion. That he cannot now reiterate it here flows from the inhibition placed upon his participation as amicus by the Attorney General's appearance for the defense (Def. Ex. O, R. 580). Notwithstanding, the administrative view has been made abundantly

clear. See pp. 53-5, this brief, infra.

⁶⁸ Letter of L. Metcalfe Walling, Administrator, Wage and Hour Division, to Vernon Williams, Cleveland Stevedore Co., May 14, 1943, which is part of the record here (Pl. Ex. 18, R. 559-561). Defendants sought to infer contrary effect of a much earlier letter of a Regional Director. But this was received subject to subsequent showing of his authority to render such opinions, which defendants never produced (Def. Ex. N, R. 576-7; R. 540-1). Further it does not appear that this opinion involved the longshore industry.

Also in accord are the opinions of recognized authorities who have studied extensively the problems of the longshore industry. Thus, in speaking of the "8-hour day" and "44-hour week", which pertained contractually here, theoretically, notwithstanding the 40-hour standard provided under the Act, Boris Stern, recent head of the Labor Information Service of the Bureau of Labor Statistics, U. S. Department of Labor, had the following to say: "

All major ports in the United States have definitely established rules pertaining to the hours of work and the rates of wages for longshoremen engaged in foreign and intercoastal shipping. Theoretically the 8-hour day and the 44-hour week has been accepted as the standard for longshore work, but in practice longshoremen are called upon to work at any hour of the day or night, depending on the hours of arrival and departure of ships. The rate of wages, however, is determined by the time during which the actual work of loading and discharging is performed. There is no such thing as "regular hours" in the longshore industry. Even when the workers "shape" regularly only once or twice a day, the hour of "shaping" has no direct bearing on the actual hours of work. (Emphasis supplied.)

Father Edward Swanstrom, recently head of the Overseas Service of the Catholic Charities of the Archdiocese of New York, reached the same conclusion in his survey of waterfront labor conditions:**

of Labor Statistics, Monthly Labor Review, July, 1943, p. 134: "Schedules of daily hours are specified in the longshore agreements, and work outside these hours is paid for at the overtime rate. Where such work is not actual overtime, this becomes a night differential at a rate which is much higher than is paid in most other industries." Obviously it would be "actual overtime" only when paid for work exceeding a normal and regular work day or work week, measured by the standards here discussed.

⁶⁸ Swanstrom, p. 26.

Although there are three definite hours at which the men are expected to shape when a ship is in at the dock, in reality the longshoreman may be hired at any hour. There is a morning call at 7:55 A. M., another at 12:55 P. M., and if night work is required a third call at 6:55 P. M. These calls follow the more or less. theoretical understanding that the longshoreman's working day is from 8 A. M. to 12 noon and 1 P. M. to 5 P. M. In practice, the longshoremans' working day more often is arranged to suit the demands of the ship. He may be hired and discharged at any hour. Gangs may even rotate to provide for a continuous movement of the cargo during the stipulated lunch and dinner hours. The unions have worked out an agreement with the shipping companies whereby a higher rate of pay is granted for the use of labor outside the hours of the stipulated working day. (Emphasis supplied.)

Manifestly, the normal and regular workday of employees regularly assigned to night duty and never, in fact, actually performing any work during the daytime hours, cannot be determined by the "basic working day" as defined in a collective agreement. Since they never work such hours at any time, it would be grotesque to regard them as their "regular" and "normal" working hours. It is equally grotesque to contemplate, as the effect of petitioners' contentions here, weeks when a man works nothing but overtime (find. 43(b), R. 615). The "regular rate of pay" at which night men are employed is obviously the rate at which these men are always paid for the night hours which they always work. The contractual designation of this rate as an "overtime" rate does not control. Equally strange is the effect of petitioners' contentions where a longshoreman's straight time follows his overtime. a man, after working 40 hours at the contractual "overtime" rate, that is \$1.871/2 for each hour, on the first five days of the calendar week, comes to work Saturday morning and is paid only \$1.25 per hour for the 41st through 44th hours actually worked that week (find. 43(c), R. 615)!

Obviously all these payments, as the "actual facts" appearing in the record and findings disclose, are payments at the "regular rate" and no part of them is statutory overtime. See 149 Madison Ave. Co. v. Asselta, 331 U.S. 199.

There is another reason why the higher rates paid under the longshore agreement are not true statutory overtime. This was first made clear by an interpretation of the Wage and Hour Division as to the nature of payment of night rates approximating one and a half times the prevailing day rates in the case of (1) employees who worked only at night; (2) others who alternated on day shift and night shift; and (3) still others who worked principally during the day but also for awhile at night. The opinion concluded:⁶⁹

While, in the normal case, the payment of a premium rate for night work to one who has also performed day work for that day is evidence that the premium is overtime. a different result obtains here because it appears that the premium compensation would have been paid even in the absence of the performance of day work by the employee on that day.

It is clear from the petition for certiorari here (Pet., p. 25) that the Administrator agrees that the Second Circuit, upon the facts found by the trial court, gave "proper con-

⁶⁹ This opinion appears in full in the record (affid., motion for new trial, ex. A, R. 635-9). The interpretation is that of the Chief of the Wage-Hour Section in the Wage and Hour Administrator's national office, charged with advising the field staff throughout the country in pending matters requiring legal construction, made available through release of the Office of the Solicitor of the Department of Labor in Washington on July 31, 1946. The opinion advised one of the Administrator's Regional Attorneys in a pending investigation involving a lithograph company reproducing material for the Government Printing Office.

Even had this administrative opinion not recognized that it embraced "questions analogous to those involved in several cases concerning stevedores (now in litigation)" (R. 636), the analogy would be apparent.

sideration • • • to his interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct". Petitioners' brief does not repeat this statement but, since the filing of the petition, the Administrator has taken the opportunity to repeat these views and to amplify them by setting forth the basis for his reasoning. Thus, in hearings before a subcommittee of the Committee on Education and Labor of the House of Representatives, when interrogated with reference to these very cases, he stated:

- think we could say that the circuit court was correct in its facts. I would much have preferred to send it to the Supreme Court without any interference and just let them make the decision. Nevertheless, if called upon, I would say that I think the facts, as submitted, are correct and that the court's decision was correct. 70
- (2) • • I just think the contention that it was overtime is not correct; it is not overtime. It was the regular rate of pay, and that was the principal question in this case.
- Mr. MacKinnon. collective bargaining contracts in the country that provide for straight-time rate and overtime rate?

The Hearings before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, 80th Congress, First Session on bills having for their object the raising of the minimum wage standards of the Fair Labor Standards Act of 1948, Vol. 2, Part 23, Nov. 20, 1947. The official transcript is now available at the Government Printing Office only in galley proof. This excerpt is from galley "30BS".

The testimony is that of William R. McComb, Administrator, Wage and Hour and Public Contracts Division, U. S. Department of Labor. The chairman of the subcommittee is Representative McConnell of Pennsylvania; exclused is Irving McConnell of Pennsylvania; exclusion and the pennsylvania; exclusi

McConnell of Pennsylvania; counsel is Irving McCann.

Thearings before Subcommittee No. 4, Vol. 2, Part 23, Nov. 20, 1947. This excerpt is from galley "30BS".

There a difference, Mr. MacKinnon, When you say, and I was waiting for you to say it, when you say why would it not apply, after you get the 40 hours, at the overtime rate, and the reason is just this, as I say, this was not an overtime rate. This was a rate for working after 5 o'clock, which any man could get; he did not have to work overtime. I do not see how we could rule that anybody coming in, who had not worked during the regular hours, but who gets the same rate of pay if he works after 5 o'clock, I do not see how we could say that was an overtime

- • In this case, I do not believe it is legitimate overtime pay. We find it is a completely separate rate paid out under Mr. McComb. the contract for the part of the work after 5 o'clock. And no man has to work overtime to get that, and I think that is terribly important. 73
- (5) You testified that you considered the socalled overtime in the longshoremen's contracts not to be true overtime because Mr. McCann. it is payable to an employee who comes to work at 5 o'clock, even though he has performed no work previously on that date. That is correct, is it not?

Mr. McComb. That is right."

rate. 72

Mr. McComb.

On the facts found by the court below, the Second Circuit's decision that the higher rates paid for Saturday, Sunday and holiday work were not true statutory overtime but merely the "regular rate of pay" for work per-

¹² Hearings before Subcommittee No. 4, Vol. 2, Part 24, Nov. 21, 1947. This excerpt is from galley "4CR"

¹³ Hearings before Subcommittee No. 4, Vol. 2, Part 24, Nov. 21, 1947. This excerpt is from galley "5CR".

Hearings before Subcommittee No. 4, Vol. 2, Part 26, Nov. 25, 1947. This excerpt is from galley "9HH".

formed on those days was correct. We have already seen that, in the Administrator's view, the Circuit Court correctly applied the statute to the facts involved in the light of his written interpretations.

Petitioners have referred to the doctrine that, where there are concurrent findings of two lower courts, they should not be disturbed (Pet. Br., p. 5, note 4). As the Second Circuit noted: "In the instant cases, on the facts disclosed in the findings", the hours worked on Saturday afternoon, Sundays and holidays were surely not

The court referred particularly to findings 19, 20, 34, 35 and 46 set out in the Appendix to Judge Frank's opinion [162 F. (2d) 665, 670-673]. The pertinent portions of these findings read as follows:

No. 19: The amount of work which may be available for longshoremen in the Port of New York, and the time of the day or the day of the week when such work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week, and season to season.

No. 20: Under the terms of the Collective Agreement in effect during the period in suit, and under previous Collective Agreements in effect over a period of many years, the long-shoremen in the Port of New York have been obligated to work any night of the week or on Sundays, holidays or Saturday afternoons, when directed, with special limitations on Saturday nights.

No. 34: During most of the period in suit the defendants required some longshore work practically around the clock, day in and day out, except Saturday nights.

No. 35: No stevedoring company worked exclusively from 8 a. m. to 5 p. m. and Saturday mornings.

* No. 46: During the period in suit, it was not unusual for the plaintiffs, in their employment by defendants, to start their work on a ship at night rather than by day, and it was not unusual to start their work on Saturday afternoon or Sunday.

To these may be added the following:

No. 44: During the period in suit, the plaintiffs, if they so desired, worked Sundays and Holidays whenever work was available to them, just as any other day.

available to them, just as any other day.

No. 45: The "basic working day" and the "basic working week" referred to in the Collective Agreement were not the working day or working week normally, regularly or usually worked by plaintiffs during the period in suit.

'outside normal or regular working hours' "[162 F. (2d) 665, 669]. Certainly, it cannot be said that these findings were clearly erroneous or unsupported by the evidence.

Thus, the "actual facts" as to the working conditions of these respondents disclosed that it was normal and customary for them to try to get work, and to work when they could obtain it, on Sundays and holidays, as well as Saturday afternoons, just as on any other day of the week. There was no conflict in the testimony on this point. The men shaped for work on these days, just as at any other time, successfully obtained work then about as often as any other day and were frequently called out in gangs for work on such days. Not only did they often start loading a ship on Saturday afterooon or Sunday, but that might be the only day of the week when they could get work. Finally, as their contract reveals, they were obligated to work on Saturday afternoon, Sundays and holidays when, in view of shipping exigencies, the employer required such work."7

76 Quite obviously appearing from the work records of the em-

ployees in these suits also is the fact that it was customary and normal to work both Saturday morning and Saturday afternoon where a man worked at all that day, and that the men rarely worked only on Saturday morning. The percentage of instances of men working forenoon hours and not after proved to be only about 6%. Saturday work instances of 55 longshoremen, including the 10 selected plaintiffs here, in the Huron case, compiled from data submitted before trial by that defendant to respondents: Before 12 noon only, 8 mstances; before and after 12 noon, 72 instances; after noon only, 46 instances; definitely afternoon and possibly before noon also, 14 instances (total, 140 instances). The same data could not be compiled for Bay Ridge employees because the record transcriptions supplied by that defendant did not show breakdown of hours as between days of the week. As to the 10 Huron employees who are respondents here, see Pl. Ex. 7.

See references to the testimony, this brief, pp. 29-34, upra. See also affid., motion for new-trial, table 3, Ex. B-2 (R. 641), indicating even distribution of work instances on the different days of the week, including Saturday and Sunday, in the case of 64 long-shoremen plaintiffs in the Huron, case.

Further, the historical development of the dual rate system prevailing in the longshore industry in New York discloses that the collective agreements have merely carried on a practice apparent before the introduction of collective bargaining in the industry. That practice was the payment of higher rates as an inducement to workers to report for shape-up on days of the week or year customarily spent by other people at home with their families, or in personal recreation or relaxation. In the absence of such higher rate payments, the men would characteristically fail or decline to turn out for work at those times, although, because of the vagaries of shipping and cargo arrivals and the unpredictability of maritime conditions, such work was essential if ships were to be unloaded and reloaded upon arrival in port and sailing schedules met. Cf. Cabunac v. Natl. Terminals Corp., 139 F. (2d) 853 (C. C. A. 7).

We are quite aware that, in his letter of May 14, 1943, discussing the Cleveland Stevedore Co., the Administrator, while recognizing the non-overtime character of the night rates, said that "overtime compensation for Sunday or holiday work "may be credited toward overtime due under the Act" because it "can be regarded as time outside the employee's normal working time" (Pl. Ex. 18, R. 561). But this merely underlines the Administrator's view that the result depends upon the facts." Further, as the Second Circuit here noted [162 F. (2d) 663, 669], "we must consider also the following":

This brief, pp. 20-27, supra.

Port of New York between 1943 and 1945, the obligation imposed by the contract to work Saturday afternoons, Sundays and holidays when called upon is equal with the obligation to work at night under similar circumstances. See par. 2 (a), of the New York agreement effective Oct. 1, 1943 (Def. Ex. A; find. 20, R. 601). The Cleveland Stevedore Co. contracts, on the other hand, did not encompass an obligation on the part of the employees to work on Saturday afternoons, Sundays and holidays (Pl. Ex. 18, R. 561).

(1) The day after that letter of May 14, 1943 was written, Judge Duffy held the contrary; see International Longshoremen's Association v. National Terminals Corp., D. C., 50 F. Supp. 26, affirmed in Cabunac v. National Terminals Corp., 7 Cir., 139 F. (2d) 852. (2) In an opinion published in the Wage and Hour Manual, 1944-1945 Cum. Ed. page 227, the Assistant Solicitor referred to a previous ruling, if the Administrator's Interpretative Bulletin No. 41 that an employer might consider "as overtime compensation" extra amounts of compensation paid "for hours worked outside the normal or regular working hours"; the opinion said that such extra compensation might be considered overtime compensation only if the "hours compensated for" were "hours not normally worked by the employees" giving as an example "work on Sundays, holidays, or at a time of day when the employee does not normally work"; the opinion, however, went on to explain that "hours worked on Sundays and holidays are generally outside the 'normal or regular working hours'."

We have already seen that hours worked at night, and on Saturday afternoons, Sundays and holidays, under the facts of the present cases, were not "outside the normal or regular working hours". It follows that the night, weekend and holiday rates were not statutory overtime but were respondents, "regular rate of pay" for hours worked in those periods.

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As the Government has successfully contended in prior litigation, true overtime must be related to a standard of excessivity of hours worked over a certain number, usually or regularly worked by the particular employee.

The position of the Attorney General in this litigation is unique. In the first place, he is defending in behalf of the War Shipping Administration suits against private

litigants (cf. Pet. Br., pp. 1-2, note 1). Secondly, the intervention of the Attorney General in this litigation has embarrassed the Wage and Hour Administrator, who commonly represents the public interest in such suits by employees or makes his opinion known as amicus curiae.

These cases have yet another unusual aspect. The Attorney General here takes a position contradictory to that advanced by the Government and sustained by this Court in prior litigation. U. S. v. Myers, 320 U. S. 561 (1944), decided that overtime must be related to some standard of excessivity over a fixed number of hours usually or regularly worked per day or per week by the particular employee, as the Government there asserted. That case construed a statute opposition:

The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of * * customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays * * *.

The suitors there, inspectors assigned in rotation to regular night tours of duty in order to provide the 24-hour coverage necessary in the Port of Detroit, claimed under the language of the statute (sounding as does the language of the collective agreement here in terms of "overtime" for any work outside of specified "clock hours") "overtime" compensation when employed on night shift and working no daytime hours. This Court held:

When we examine the language of Section 5, * * we find convincing authority to support the Government's view as to the meaning of overtime? Govertime? as we pointed out above was substituted by the 1920 mendment of Section 5 for "nighttime" serv-

^{** 41} Stat. 402, c. 61; 19 U. S. C. § 267, Sec. 5.

ices. [81] The section requires employees to "remain" on duty. The usual instance of the payment of extra compensation would be for work after 5 P. M. by an inspector who had previously worked full time. The Government is correct in its interpretation of the last proviso of Section 5 as permitting shifts in an inspector's regular hours of work. Night assignments are an old administrative practice. * We are led to the conclusion that overtime, as applied to week days, refers to hours longer than the daily limit of 8 A. M. to 5 P. M., nine hours with one hour for food and rest. (Emphasis supplied.)

The Court concluded that extra overtime compensation under the statute was payable only for "overtime services in the sense of work hours in addition to the regular daily tour of duty [that is, 8 hours] without regard to the period within the twenty-four hours when the regular daily tour is performed." Extra compensation for Sundays and holidays, however, was to be paid (as here in practice) "without regard to whether services on those days were overtime."

The Government, in its brief to this Court in the Myers case, said the following: ***

The term "overtime" in its usual and generally accepted sense means, "extra working time,"; that is, working time in addition to the regular time normally devoted to work."

*One who works more than the usual number of hours per day is said to work overtime. Cote v. Bachelder-Worcester Co., 85 N. H. 444, 447. "Overtime," according to Webster's New International Dictionary, is "Time beyond, as in excess of, a set limit; esp., extra working time." And according to the Oxford Dictionary the term means "Time during which one works over and after the regular hours; extra time."

The historical background of the statutory provisions involved in the Myers case (cf. find. 38, B. 611-2; R. 440-51),

⁸¹ Cf. changes in the contractual nomenclature here, pp. 26-7, supra.

⁸²a See Pet. Br., Nos. 142-145, Oct. Term, 1943.

indicates the parallel of "clock hour" designation as between the provisions affecting customs inspectors and those affecting longshoremen under their collective agreements. That decision, therefore, supports respondents' contention that, regardless of "clock hour" designation, true overtime must relate to a standard of excessivity of hours over a fixed number of hours normally, usually or regularly worked.

IV

Petitioners' contentions do not warrant disturbance of the Circuit Court's determination.

A. The criteria adopted by petitioners' expert witnesses for distinguishing overtime from shift premiums were inconstant, inconclusive and not in accordance with sound economic authority.

We urge at the outset that, in weighing the effect of petitioners' expert testimony and statistical surveys, the Court is completely free to reach its own conclusions, regardless of Federal Rule 52(a). The trial court received such matter only as argument and not as evidence. Accordingly, in relying upon such testimony even to the extent of incorporating it in findings (find. 28, R. 604-6; find. 39, R. 612), the trial court could not properly have dignified this material above the limited purpose for which it was originally received. We are thus free to demonstrate not only that the testimony of the experts was inconstant and inconclusive but that it was contrary to economic facts of common knowledge, attested to by recognized authorities.

Prof. Taft and Dr. McCabe gave testimony (cf. Pet. Br., pp. 32-8) over objection, that—

^{*} See references, this brief, pp. 8-11, supra.

on the point of law see 9 Wigmore Evidence (3rd ed.) § 2567 (c). See also Shapleigh v. Mier, 299 U. S. 468, 474-5.

- (a) overtime as developed historically through collective agreements in American industry is a premium intended to inhibit work either in excess of a limited number of hours of outside a specified pattern of clock hours;
- (b) the prevailing relation between straight time and overtime rates in American industry is generally 150%;
- (c) The customary range or extent of shift differentials in American industry is usually 5 or 10 cents per hour, or 5% to 10%, and seldom in excess of 15 cents per hour;
 - (d) a shift differential is designed to induce work during hours outside the basic shift, while overtime is designed to inhibit work by placing a deterring financial burden upon the employer;
- (e) the "overtime hourly rate" in the longshore industry in the Port of New York is true overtime as industrially understood and not a shift differential. [R. 325-7, 330-4, 337-8, 419-20, 425, 426-7, 433-6, 438].

Two criteria were thus stated: (a) the purpose of the premium to induce or to inhibit night work; (b) the size of the premium (cf. Pet. Br., pp. 32-5, 37-8).

These criteria were applied by the experts to the longshore industry in a manner somewhat less than scientific. There had been testimony that numerous factors inhibited night work in addition to the higher rate of pay. Thus:

- (1) Workers cannot see as well at night;
- (2) Movement of harbor lighters is delayed;
- (3) A man's vitality is low after midnight:
- (4) On the whole, work output is substantially diminished:
- (5) And, finally, the extremely high accident rate prevailing in this industry is certainly not diminished

by the poor vision and low vitality at night. [R. 57, 150-2].

The trial court in fact found that "overtime work is less efficient than work in 'straight time' hours" (find. 26, R. 604). Undoubtedly, the foregoing factors affecting efficiency had more pronounced effect than the spread in rates in limiting the amount of night work. Yet the experts made no effort to eliminate these other coexisting factors from the inhibitory tendency which they professed to find and to isolate the rate differential as the sole responsible cause. Under the circumstances there was no scientific foundation for their conclusion.

Prof. Paft likewise professed to discover inhibitory effect in the result of defendants' statistical surveys (R. 384-5). He apparently understood the incidence of night work to be about 17% in longshoring and regarded this as a proportion adequate to demonstrate an effective inhibitory function in the premium rate (R. 385). By coincidence, the ratio of night shift employees to total employees on all shifts in industrial plants pursuing rotating night shift operations without "punitive overtime" is just 17%!

Further, appropriate scientific approach is absent from a test which assumes that a purpose to inhibit overtime may operate freely or capriciously, without reference to economic factors. Obviously, in the realin of economics the necessary effect is more important than any pure volitional purpose. In the economy of the longshore industry,

⁸⁴ National Industrial Conference Board, Night Work in Industry (1927), p. 34, indicates 11% greater frequency of accidents on night shifts than during the day, in a representative group of industries. Cf. U. S. Bureau of Labor Statistics, Injuries and Accident Causes in the Longshore Industry, Bull. No. 764 (1942), indicating that the injury rate in the longshore industry far exceeds that in any other American industry.

⁸⁵ Lower efficiency and output of night forces is well known in industry generally. See Night Work in Industry, p. 40.

⁶ See Night Work in Industry, p. 8.

the effect of the premium payment was not in fact to restrict night work.. Financial disadvantage to the steamship companies could only have resulted from failure to work during the contractual "overtime" periods when pecuniary self-interest dictated. To point to the fact that the stevedores did not make money in work outside the basic day begs the question, for they could work "overtime" only with pernfission of the steamship company. The inquiry must therefore be addressed to the ratio of additional overtime cost to the cost of the steamship operations. [Cf. find, 22, R. 602; find, 26, R. 604]. The extremely high rate of port cost-no less than \$2,000 to \$4,000 for each day a cargo ship is kept in harbor-makes it apparent that it is usually financially desirable to work at night in order to get a ship out and avoid additional port charges." The trial court recognized this, for it found:

The decision whether to work 'overtime' was controlled by the necessity of meeting scheduled sailing dates in the case of passenger liners, and otherwise by financial considerations turning on whether the overall cost of a later departure exceeded the cost of 'overtime'." (find. 22, R. 602).

Further, it appears only that "stevedoring companies never worked 'any more overtime than was necessary'" and "steamship companies in the Port of New York have preferred to confine the handling of cargo to 'straight time' hours to the greatest possible extent" (finds. 22, 25; R. 602-3). Since it is apparent that plans for the handling of cargo on any vessel would have to be "readjusted from time to time on account of delayed arrival (of the ship); necessity for repairs, delay in arrival of outgoing freight, weather conditions and other factors" (find. 22, R. 602), the deterrent effect of the premium rate is obviously limi-

⁸⁷ MacElwee and Taylor, Wharf Management, Stevedoring and Storage, pp. 2-8. See also E. H. Lederer, Port Terminal Operation (1945), pp. 129-130.

ted in scope. Nor could premium rates deter stevedoring companies, which were reimbursed for the additional wages, plus insurance and Social Security tax (find. 26, R. 603.4).

The upshot of the matter is that, both in actual practice and from the point of view of stevedoring economy, the overtime rate could not operate as a pure deterrent. We shall deal presently with the undependable character of the statistical surveys upon which the expert witnesses relied for their conclusion that the 50% premium has deterred. Even these surveys admitted a consistent incidence of 20 to 28% night, Sunday and holiday work in the Port of New York in peacetime years (Def. Exs. D-E), rising to 45% during the war (Def. Ex. J).**

The language in which Mr. Ryan expressed the union's fundamental purpose in insisting upon a higher rate for night. Sunday and holiday work, casts an additional shadow upon the experts' testimony. Mr. Ryan attested to the objective."to have the work done in the day time as much as possible" and "to make night work so expensive that they would work in the day time" (R. 173, 1802186, 188-9; find. 22, R. 602). This contemplates no deterrent against working long or excessive hours; it merely reflects the natural human desire to work by day and retire at night. But petitioners, following the line of their experts' testimony, urge that overtime as understood in American industry has always included, as an alternative concept; hours sutside a basic clock pattern (R. 326-7; 425-6; cf. find. 28, R. 604-5; find. 39, R. 612; Pet. Br. pp. 36-7). Further, they have made reference to some 20-odd industries

petitioners understated the "overtime" appears from the fact that even in a decasualized port such as San Francisco, between 40 and 50% of the hours worked were "overtime", even in peacetime. Marvel Keller, Decasualization of Longshore Work in San Francisco, Works Progress Administration, National Research Project, Report No. L-2 (1939), p. 107; Richard A. Lester, Economics of Labor, p. 201.

in which there are "contracts establishing workday limitations by reference to clock-hour schedules" (Pet. Br., pp. 58-9).

Prof. Taft stated on cross-examination that of some 300odd contracts he had examined, only 20 had an overtime clause applicable to specific hours (R. 384, 389); and all of these (with the obvious exception of the Atlantic Coast. longshore industry) appear to have combined the two concepts of excessivity and abnormality of clock hours:

two concepts were usually joined together. You might find that the overtime provisions were defined as hours in excess only. Then you may find, again, that the overtime, was defined as hours in excess and also as applicable to specific hours.

Q. Did you ever have the second without the first? A. I do not recall it, sir" (R. 327).

As a matter of fact virtually all collective contracts include excessivity as an essential element in the computation of overtime." And this is the similar indication both

For example, Union Wages and Hours in the Printing Trades, July 1, 1945, B.L.S. Bull. No. 872, p. 13, reported that: "Practically all the organized workers in * * * the industry received an initial overtime rate of time and a half for work beyond the contract. hours." And in the petroleum refining industry, "all except 3 of the 21 agreements" surveyed required "payment of time and a half after 8 hours per day or 40 hours per week". Union Agreements in the Petroleum-Resining Industry, B.L.S. Bull. No. 823, p. 6. The same

Petitioners have collected references to 20 industries in which they profess to find the workday limited "by reference to clock-hour schedules" and "overtime rates" paid for work "outside such limits" (Pet. Br. pp. 58-59). Intimating that the collective agreements in these industries provide for such overtime without regard to excessivity, they fear "a condemnation of such wage-patterns" will "invalidate widespread contractual arrangements in many industries". But, unlike the Atlantic Coast longshore contracts, virtually all the agreements cited have provided overtime only for work beyond or in addition to hours regularly worked. Petitioners have intimated otherwise only because they have inadequately examined the authorities and inaccurately stated their effect.

of the precursor statutes to the Fair Labor Standards Act in the regulation of hours and of the economists who have defined the term.**

is true of collective agreements in the coal and metal mining industries. See Tenn. Coal, Iron & R. R. Co. v. Muscoda Local, 321 U. S. 590, 609-611. Similar examination of petitioners' other references (Pet. Br., p. 59, note 20) discloses virtually no other industry where contractual "overtime" pay is based merely, on work outside a pattern of "clock hours" without reference to any standard of excessivity. Curiously enough, two of the industries to which petitioners allude are the building trades and motortruck transport (B.L.S. Bulls. Nos. 910 and 874, respectively). But new construction is not covered by the Fair Labor Standards Act [Noonan v. Fruco Construction Co., 140 F. (2d) 663 (C. C. A. 8); Barbe v. Cummins, 138 F. (2d) 667 (C. C. A. 4)]; and truck drivers and helpers are specifically exempt from the overtime provision of Section 7 (Bayley v. Southland Co., 319 U. S. 44).

Petitioners have stated that contractual "overtime" solely on a "clock hour" basis prevails in 10 industries cited in Premium Pay Provisions in Selected Union Agreements, 65 Monthly Labor Rev. 419, Oct. 1947 (Pet. Br., p. 58). But petitioners have apparently misread the authority. Ibid., p. 424. As to Paelific Coast long-shoring, cf. the contractual "overtime" there, which relates to a standard of excessivity. And in the men's clothing industry overtime over 40 hours is either flatly forbidden, or compensated on an excessivity basis as is the case in shipbuilding. Ibid., p. 420.

Finally, it should be noted that penalty rates for hazardous, dirty or unpleasant work are well known in the longshore, shipbuilding and paper industries and that they frequently run as high as 150% of the base rates in these industries without regard to the number of hours previous, or the time of day when the work is performed.

Ibid., p. 424. See also Pet. Br., pp. 56-7.

⁸⁰ See the various 8-hour laws cited in Pet. Br., pp. 32-3, note 14, all of which refer to hours "in excess" of 8. Statutes such as those designed to regulate overtime of customs inspectors patterned on a clock-hour basis, cited at the end of Pet. note 14, have been construed by this Court as operative only on an excessivity basis. See this brief, pp. 59-62, supra. As to the economists, see Millis and Montgomery, Labor's Progress and Some Basic Labor Problems, pp. 463-4; Brookings Institute, The National Recovery Administration, p. 372, for example; and cf. Pet. Br., p. 32, note 13. References there all speak of true overtime as "emergency" in character; it thus contrasts with the recurrent need in the longshore industry for "off-hour" work.

Next, we may note that the recognized unique character of the shape-up as a hiring device and short-lived duration of the employer-employee relationship upon each fresh hiring in the longshore industry would, in any event, effectively vitiate the force of any comparison with contracts in other industries or with the function and character of overtime in American industry generally (cf. find. 14, R. 599). Moreover, the historical development of the hours and rates of pay in the longshore industry, to which we have already adverted, clearly indicates that the pattern of the collective agreements in the longshore industry in the Port of New York could not possibly, as the experts opined and the trial judge agreed (find. 39, R. 612), have "followed the prevailing pattern in organized American industry." On the contrary, the longshore pattern evolved chronologically much before the developments with which it was compared.

Thus, we have seen the night premium, as well as third rate for Sunday and holiday work, moving up and down, dependent upon general business conditions, unilateral action upon the part of the shipping companies, lost strikes, resistance among the workers to night work, and we have seen also the variance of rates from pier to pier and period to period. All this justifies the conclusion that the differentials were necessary to induce workers to turn out to shape and work at undesirable times of day and days of the week when they would rather be at home or enjoying leisure pursuits. It places great enough strain on the credulity to suggest that this unique pattern has been part of the general hours reduction movement. Petitioners' position becomes completely incredulous when it is seen that, while this pattern was evolving in the longshore industry in the Port of New York, the degree of

⁹¹ This brief, pp. 20-26, supra.

labor organization throughout the country along the lines we now know was negligible.**

Prof. Taft's and Dr. McCabe's distinction between socalled "true overtime" and what was termed a shift differential was founded primarily upon the amount of spread . between the base and the premium rates. The experts referred to the usual range of a shift differential as 5% to 10% above the basic hourly rate, or 5¢ to 10¢ and, rarely, 15¢ per hour. The highest shift differential Prof. Taft had known was one of 25% prevailing in the Pacific Coast lumber industry, which he dismissed as being founded upon unique circumstances (R. 333). Further, within his definition shift differentials existed only in continuous process industries or where orders accumulating were large enough to occasion the spreading out of the work over an additional shift (R. 334). When pressed to identify the criteria of overtime, he began with the amount of the premium over the base rate (R. 339). He at first indicated as an additional criterion use of the descriptive designation "overtime" in collective agreements (R. 340-1) but subsequently agreed that this was inconclusive (R. 350-1) and returned to "the amount or ratio" as the essential test; in effect a 50% premium appeared to him to establish a virtually "irrebuttable presumption" that the payment was overtime (R. 341, 354-5, 365).

In answer to inquiry from the bench, Prof. Taft maintained that the higher rates must be overtime in all the following purely hypothetical examples (R. 355-8):

1. Aviation flight pilots paid \$2 per hour for duty between dawn and dusk, and \$4 per hour for night flights.

^{**}Robert F. Hoxie, Trade Unionism in The United States, pp. 92-93; Lois MacDonald, Labor Problems and the American Scene, pp. 413-4; John Dunlop, The Growth of the American Economy, pp. 614-5. And note that of 169 national unions listed in Carroll R. Daugherty's Labor Problems in American Industry, table 29, pp. 351-7, only six antedated 1872.

- 2. Transcontinental railroad engineers paid \$1 per hour for work from 8 a. m. to 5 p. m., \$2 per hour for work between 5 p. m. and 3 a. m., \$3 per hour for work from 3 a. m. to 8 a. m.
- 3. Seamen aboard ship paid 50 cents per hour for work from 8 a. m. to 5 p. m., \$1 per hour for work between 5 p. m. and 8 a. m.

Yet where crews were rotated through the periods carrying the different rates, he thought he might then conclude that the identical amounts were shift differentials, provided there were actual shifts (R. 361).

Prof. Taft apparently based his judgment concerning the mathematical limitation as a distinguishing characteristic of the shift differential upon a survey of the War Labor Board orders and determinations during World War II (R. 376-9) and conceded that the shift differential in continuous process industries was a development of the two wars and the period between them (R. 333). But he recognized also both that the whole effort of the War Labor Board program, in line with the policy directives of the Economic Stabilization Director, was to limit wage increases in the interest of preventing inflation, and that the directives did not purport to disturb prevailing practices but merely to set up standards in disputes over new of increased rates, in the interest of inflation control (B. 373). Why a survey of the War Labor Board cases should establish a principle to determine the effect of a practice developed 60 or 70 years earlier and persisting all through the years since was never satisfactorily explained (R. 383-399). Completely confusing also was the following series of colloquies with the trial court:

(1) "Supposing you had a labor agreement which said that in order to inhibit work between the hours of 4 and 6 in the afternoon the rate shall be 110 per cent of the normal day's rate for those two flours; would you call [that an] overtime providen or a shift differential? A. A shift differential" (R. 355).

(2) "Suppose you had an industry which could well afv" ford to pay \$1.10 an hour but the men are only moderately organized, and the best they have been able to get from their employer is an agreement calling for a dollar an hour for the first 40 hours, and there is a provision that for all hours in excess of 40 the employer shall pay \$1.10, that that is the result of a strike of 30 days duration, and finally that is what they agreed on. What do you call it then?

The Witness: I think that would be an overtime rate, providing of course * * * the increase in rate had an inhibitory effect or tended to have that. believe with your example it would be an overtime rate" (R. 393).

It thus appeared that sometimes a 10% differential could become an overtime rate, dependent not on the contractual purpose at all, but only upon whether it actually tended to The size of the differential as the touchstone for . inducement or inhibition thus lost all significance. versely, no reason appeared why a 150% differential could not serve to induce as well as inhibit. Thus the inquiry ultimately relapsed into mere semantics.

When pressed, Prof. Taft conceded that a 30¢ difference between base and premium rates would approach the "twilight zone" between differential and overtime (R. 394-5). This choice of the point of middle ground presumably followed from his observation that he had never heard of a 50% shift differential and that the highest he knew was 25% (R. 332-3). The spread in the rates as the sole test becomes utterly ridiculous when it is seen that recognized shift differentials in excess of 25 or 30% are by no means unknown and that in fact they do occasionally reach 50%! Thus 31% appears in the shipbuilding industry, 33%

⁹³ U. S. Dept. of Labor, Monthly Labor Review, July, 1943, pp. 142-3—a 15% differential, plus 8 hours' pay for 7 hours works on third shift = 131% of the first shift base rate.

in the airframe manufacturing industry, 35½% in the printing industry, and 50% in motion picture producing. On the other hand, it is quite clear that overtime prior to the leveling effect of the Fair Labor Standards Act varied in different plants and under different contracts from straight time of irregular lump, sum payments, through time and one-quarter and time and one-third, to time and one-half or even double time; and in industries composed of numerous small plants substantially unaffected by the Act, the free play of economic forces has continued to indicate a great range even subsequent to 1938.

p. 346—a 10% differential, plus 8 hours' pay for 6½ hours work on third hift = 133% of the first shift base rate.

Observation of Comparison of Commercial Contracts of Printing Unions on January 1, 1940), pp. 63-4—a rate of \$1.846 per hour on third shift for cylinder pressmen in New York City = 135% of base rate of \$1.362 per hour on first shift.

Night Work Differentials in Union Agreements in California (1942), p. 23, table 11—premium above day rate for fourth shift — time and one-half (150%) straight-time base rate payable on three previous 6-hour shifts. See also Night Work in Industry, pp. 23-4—indicating night shift differentials as high as "50% extra" on temporary fixed night shifts.

stances of overtime rates analyzed under the NRA prior to passage of the Fair Labor Standards Act, about 50% showed time and one-third and 50% time and one-half rates, respectively; National Industrial Conference Board, Service Letter, March 31, 1937—of 349 companies analyzed with uniform overtime rates of pay the rate was straight time in 131 instances (371/2%)—time and one-third in 56 (16%)—time and one-half in 108 (31%) and double time in 2 (6%). From this it quite clearly appears that it is only the Fair Labor Standards Act that has brought about since 1938 the significance of 150%.

⁹⁸ See Handbook of Labor Statistics (1941 ed.), Vol. II, p. 36, covering the bakery industry, for example.

To explain away the disturbing coincidence in the "twilight zone" the experts ultimately merely revised their definition! Now it relates not only to the amount of the spread, but also to the existence of "regularly established shifts of fixed duration" (Pet. Br. p. 34; cf. R. 332-4, 356, 368-9, 426-8). The conclusion is inescapable that the tests suggested were designed to successfully exclude the longshore night rates from the realm of shift differentials and to place them in the realm of true overtime as defined. Prof. Taft had admitted that if the longshore contracts were changed in only one particular, namely the three shapes a day were contractually designated as fixed shifts, with \$1.25 paid on the first and second and \$1.87\ paid on the third or night shift, despite the spread, he would be compelled to conclude that the 150% rate was a "shift differential" (R. 413-7). But it is obvious that the shape varies from a fixed shift in factories only in the manner dictated by the casual hiring. and uncertain duration of employment in this industry. And there has been no particular disposition by disinterested economists to regard it as other than a shift of somewhat unique character. Repudiating the testimony of its own economist, that their novelty impelled against the conclusion that longshore shapes are shifts (R. 368-9), petitioners have in their present brief conceded that there may be shifts in the longshore industry, at least on the Great Lakes.100 Thus a 10¢ differential between day and

⁹⁰ Keller, Appendix B, p. 107. At least one of the petitioners economist witnesses spoke of the shape as a "shift" (R. 248). See also U. S. Dept. of Labor, Monthly Labor Review, July 1943, p. 136, Table 2, footnote, indicating that the Bureau of Labor Statistics has classified premium pay for "work between specified hours such as 6 p. m. to 6 a. m." under "One Differential for Night-Work."

nals Corp., 50 F. Supp. 20, affd. 139 F. (2d) 853 (C. C. A. 7) as a "shift differential", thus apparently conceding that shift operations

night longshore rates (actually 17% above the base rate) in Milwaukee is a shift premium, but in the Port of New York, where there long ago developed an endemic 50% difference, no part of the premium is to be deemed necessary to induce might workers to turn out under similar conditions!

Equally incredible is the suggestion that a 10¢ differential to second or third shift workers in rotating shifts is designed as an inducement to get them out to work. On the contrary, practical considerations make it apparent that the swing shift worker is not induced to work, he is told when and where his shift is to report, if he wishes to work. He makes his choice on the inducement of his basic rate, not the premium he is given for his inconvenience. It is the \$1. that induces him to come out, not the 10¢ additional. Or, as Prof. Taft reluctantly agreed, it is the average of the various rates at which he may be employed over a period of time, which he comes to recognize as contributing to his normal "take-home" pay. Thus it appears that where a powerful union wishes to use a 50% night premium as a device "for actively increasing the normal day's pay", including both day and night work, in one shift, or anticipating their average on rotating shifts, we have to deal then neither with a shift differential nor with true overtime, but with a "higher normal rate" (R. 366-7).101

exist in the longshore industry (Pet. Br., p. 71, note 24). However, the conditions under which longshoremen worked on the Great Lakes are no different from those in the Port of New York. See Boris Stern, Cango Handling and Longshore Labor Conditions, U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 550. Further, petitioner now concedes that shifts might possibly have been "present in the New York longshore industry * * * in the case of some stevedoring companies during the war years" (Pet. Br., p. 35).

see the Administrator's opinion in the Consolidated Vultee Aircraft Corp. case set forth in full in the record here (Pl. Ex. 19, R. 561-6). See also note 46a, p. 25, supra.

From all the foregoing the inference is inescapable that longshoremen are paid a 50% premium for turning out for work nights, because of the general undesirability of night work, exposure to adverse weather conditions and a high rate of hazard, and they will not turn out without great incentive. Likewise, if a man misses a job on a shape at 8 a. m., he may yet make one at 1 p. m., or he may be ordered back at any one of a half-dozen times between 8 a. m. and 3 p. m., in anticipation of a ship arrival or cargo availability; but if he misses a shape at 7 p. m., his time goes completely unrewarded (R. 76-81; 497-505). The need of the high incentive is thus inherent in the peculiar character of the hiring device, the high accident risk and the casual nature of the employment relation. Prof. Taft himself recognized the effect of "special dangers to health" and high "accident incidents" in occasioning high rates of pay (R. 356, 363).102 Thus it was that the employers "always found it difficult to get men to turn out for a 6:55 p. m. shape. They not infrequently did not show up at all, or they flatly focused to work at night" (find 27, R. 604).

B. The 1938 longshore collective agreement was designed to perpetuate the prestatutory wage scheme without change to conform to the statutory requirements.

We cannot leave without comment petitioners' intimation with regard to the collective agreement that it was not artifically created to negate the statutory purpose because its historical structure antedates the Fair Labor Standards Act (Pet. Br., p. 63): It is abundantly clear that what the contracting parties sought to do in the long-shore agreements from 1938 on was to perpetuate the prestatutory wage pattern without adjusting their em-

of laboring nights, Sundays and holidays, when others "have off" and of the "harmful physical and social effects that accompany such an unnatural worktime".

ployment relations in any wise to the statutory requirements.

As the Circuit Court observed here: "In the Fall of 1938, after the enactment of the Fair Labor Standards Act", the renewed agreement "changed the labels". What had previously been designated simply as the rate for the hours from 8 a. m. to 12 noon and 1 p. m. to 5 p. m. Monday to Friday, and from 8 a. m. to 12 noon Saturday, was "now called 'straight-time' ". The rates which had previously been fixed "for what the agreements called 'all other time'", were "now called 'overtime', the rates for that period being newly described as 'overtime rates'" Further, "this nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits. No other significant changes were made in the agreements after the Act went into effect" [162 F. (2d) 665, 666-7; see also find. 33, R. 6091.

Additional evidence of the fact that the parties had no intention of attempting to reconcile their contractual program of wage payments with the statutory requirements is seen in the fact that they perpetuated the 44hour workweek all the way through 1945, notwithstanding the fact that, since October 24, 1940, the Act has prescribed a 40-hour maximum. We have seen, as the only reason offered for this, the stubborn insistence of the employers that the Act's 40-hour standard "was not applicable to the steamship industry".163 Nor does the position of the shipping companies and the International Longshoremen's Association appear to have been modified in any, way following the Administrator's opinion in 1943 (Pl. Ex. 18, R. 559-60) and the adverse holding with regard to the Great Lakes agreements in the same year in a case in which the Union was a party plaintiff. See I.L.A.

¹⁰³ This brief, p. 27, supra.

v. Natl. Terminals Corp., 50 F. Supp. 26 (E. D. Wis. 1943), affd. sub. nom. Cabunac v. Natl. Terminals Corp., 139 F. 853 (C. C. A. 7, 1944).

Under the foregoing circumstances, it is apparent that this is not a situation where employers, because of reliance upon prior court decisions or interpretations of the Administrator, have been lulled into unwitting violation of the statute. On the contrary, it is submitted, there is here indicated as transparent an evasion of the statutory requirements as the more elaborate and artful use of a formula whereby "boosted" hours were used as a divisor in obtaining the rate of pay, such as this court held to violate Section Vin 149 Madison Ave. Corp. v. Asselta, 331 U. S. 199. In his reasoning in the latter case, the Chief Justice has given us a further ground for decision here:

The payment of "overtime compensation" for nonovertime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the "overtime" compensation is calculated [331 U. S. 199, 205].

The fact that the change in contractual nomenclature to meet the impact of the Act was here more superficial than artificial is no reason for declining to follow that precedent.

C. Petitioners' statistical surveys were not only irrelevant but subject to defects which deprived them of reliability and weight; the emphasis on portwide peacetime data was designed to conceal systematic discrimination against Negroes by assigning them to undesirable night and weekend work which thus became their normal and usual periods of labor.

We deal here with two related matters suggested by petitioners' line of argument: (1) petitioners' statistical surveys were not only irrelevant but subject to defects which deprived them of reliability and weight; and (2) the

emphasis on portwide peacetime data was designed to conceal systematic discrimination against Negroes by assigning them to undesirable night and weekend work which thus became their normal and usual periods of labor.

1. Since the defense experts relied so completely upon the effect of the statistical surveys to indicate an inhibitory effect of the premium wage payments upon overtime under the longshore agreements, their expert opinion is divorced of all force when the defects in the statistical tables are exposed. The exhibits were designed to show that the pattern of hours worked by longshoremen during the war years and in peacetime, respectively, approached coincidence with the so-called "basic working day" established under the master contract (R. 29-30, 235-6; Def. Exs. D [1923-37], E [1938-9]). To do this the statisticians broke down the total man hours worked by various stevedoring contractors to indicate work at night by those who had previously worked 6-8, 4-less than 6, 2-less than 4, and 0-less than 2 hours, classified as "straight time", respectively, in the same workday. This was what the statistician terms a selection of "course groupings," such as might obscure the true facts. It is not possible to tell from these tables how many employees worked the basic normal 8-hour workday, or whether any did. It is at once apparent that the 6-8 hour division contains three "hourpoints" as against two for each of the other brackets.

The inference is strong that this departure from standard practice of setting up equal classifications was designed to bolster the impression that 8 hours was normal by "loading" the breakdown in the direction of the top bracket. Every standard work on statistical methods emphasizes that frequency distribution tables should be set up by grouping the items to be posted in classes of equal size. In view of the fact that the contract specifies a

theoretical 8-hour "basic working day", departure from a simple and uniform breakdown indicating those who had worked respectively the unit hours from 1 to 8 in each day, prior to working contractual "overtime", should have been justified by petitioners' statisticians, absent which their presentation is surely suspect (R. 244-5). Failure to include the 8-6, 6-4, 4-2 and 2-0 breakdown in the contemporaneous survey (Def. Ex. J [1944-5]) although the basic data were available (R. 244-5), makes the inference inescapable that its effect would have been unfavorable. The trial court recognized the unreliable character of the result (R. 230-1), yet followed it as a ground of decision (opin. R. 590; find. 29, R. 606-8; find. 39, R. 612).

Among other defects in the tables104 (1) petitioners were not included in the early survey and for many of the years. reports were limited to a very few companies, sometimes. but one or two (Def. Ex. D; R. 131-3); (2) the second survey covered only 17 companies, although 47 were embraced oin the 1944-5 survey (Def. Exs. E-F, R. 236-7) and no satisfactory explanation of why mere than three times as many companies should have been included in the contemporaneous study was ever forthcoming; (3) the latter was based on the selection of but 2 weeks from one month in each quarter of the period of one year covered, or 8 selected weeks out of the 156 weeks or more involved in the period in suit (R. 228-36); (4) three companies included in the earlier surveys were eliminated from the, later one (R. 236-7); (5) the surveys were limited to ocean-going shipping and coastwise shipping was excluded without explanation (R. 296); (6) the inference that the

Defs. Exs. D-F, they questioned their admissibility and certainly did not concede that the methods and procedures used in gathering the data were sound or free from suspicion. And the trial court by no means "found" that Def. Ex. J was accurate or sound. Cf. Pet. Br., pp. 5, note 3, 11-12, 39.

whole project was "loaded" in the direction of the result desired to be shown is borne out by the testimony of its director that in the attempt to get a "proper and more general sample" it was found necessary to bring in more and more companies as the study developed (R. 294-5, 308; (7) as to the instructions to the companies in submitting the breakdown of their payrolls to indicate data requested, he conceded that they "could have been drawn more unequivocally" (R. 302).

With all these defects the surveys still indicated between 20% and 28% of the total number of longshore man-hours were consistently outside the basic working day as defined by the agreement between 1923 and 1939, and this increased to 45% in 1944-45 (find. 29, R. 606-8). before the war no less than 42% of contractual "overtime" was worked by men who had previously worked no "straight time" hours or fewer than 6 "straight time" hours, and 23% of the night work was worked by men who had previously worked no "straight time" hours during the same day. In 1944-45, night work amounted to 25% of total man hours and work on Saturday afternoon, Sundays and holidays constituted 20% of total man hours; and 44.5% of the night work then was worked by men who had previously worked no "straight time" hours during the same day (find. 29, R. 506-8).

In the light of the above criticism of the tables, it appears clear that even in peacetime over 50% of the overtime hours was worked by men who had not on the same day worked the basic 8 hours referred to in the contract and that there was a consistent group of longshoremen on night shifts who worked no daytime hours at all the same day. The inference is further sustained that the unique character of the hiring device in the industry creates a temporary shift for the day or night, for the duration of the shape, or for the time being for such portion thereof as might be worked on the particular hatch or

ship. 108 Finally, we may point to the contrast with the 1944-45 survey presented by the work pattern of the 20 respondents, which showed 80% "overtime" and only 20% "straight time" (Appendix, this brief), indicating that the defects in the defense surveys have distorted the true picture—at least as it related to these respondents. Here again, respondents' work patterns indicate that the long-shore shape may be assimilated to a novel type of temporary shift evidenced particularly by the calling out of crews in gangs as ship and cargo arrivals indicate.

2. Petitioners have said that "there is no question that the work pattern of respondents varied from those of the industry as a whole" (Pet. Br., p. 45), and they have characterized respondents as among a "small number of workers . . . who, because of special circumstances work preponderantly in overtime periods" (Pet. Br., p. 47). They have urged also that, as developed by their portwide statistical surveys, the "preponderance of employees" earned overtime rates only in emergencies (Pet. Br., p. 66) and that "a typical case" such as represented by respondents' work patterns should not govern in determining their "regular rate of pay" here (Pet. Br., p. :46). Rurther, petitioners have pointed repeatedly to the substantial amount of night work prevailing in the case of some longshoremen such as respondents here as an "aberration" of the war years (Pet. Br., pp. 12, 20, 35, 39, 41, 45, 47, 51, 66).

But we have seen how it came about that Negroes such as respondents were hired in gangs for night work during the war, following the employers' urging that the Union "bring them is hid let them work nights" (R.

of types of night work in Industry, pp. 6-8 ff., indicating the variety of types of night shifts in mass production industries, such as rotating, regular fixed, temporary, etc.

¹⁰⁰ See references, this brief, pp. 29, 32-4, supra.

176). Thus the Negroes were given the night work, although they would have preferred day work if they could get it. Characteristically it has always been extremely difficult for them to get employment on any shape during the daytime in this industry in the Port of New York. 107

Obviously, statistical studies and surveys based on peacetime employment experiences or industry-wide work patterns are woefully inadequate criteria with respect to the "regular rate of pay" of respondents who, because of the "cruel accident of birth" (cf. Steele v. Louisville-Nashville R. R. Co., 323 U. S. 192, 209), could only get work at night and in fact were specifically hired for this relatively underirable work.

Furthermore, this Court has repeatedly held that, in view of the statutory language, Section 7's application depends solely upon the duties, employment experience and work pattern of the individual employee and not, as petitioners urge (cf. Pet. Br., p. 47), that of the industry as a whole or even of the particular employer. See Kirschbaum v. Walling, 316 U. S. 517; Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88; Walling v. Jacksonville Paper Co., 317 U. S. 564; Overstreet v: North Shore Corp., 318 U. S. 125; McLeod v. Threlkeld, 319 U. S. 491; cf. Intl. Longshoremen's Assn. v. Natl. Terminals Corp., 50 F. Supp. 26, 29. Thus, the Administrator's statement of the appropriate test for determining true overtime, as "hours worked outside of the normal or regular working hours" of the individual employee108 is in substantial accord with this Court's guidance as to the principles under which Section 7 operates.

¹⁰⁷ See references, this brief, pp. 28-30, 32-3, supra.

¹⁰⁸ Cf. this brief, pp. 47-9, supra.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be in all respects affirmed.

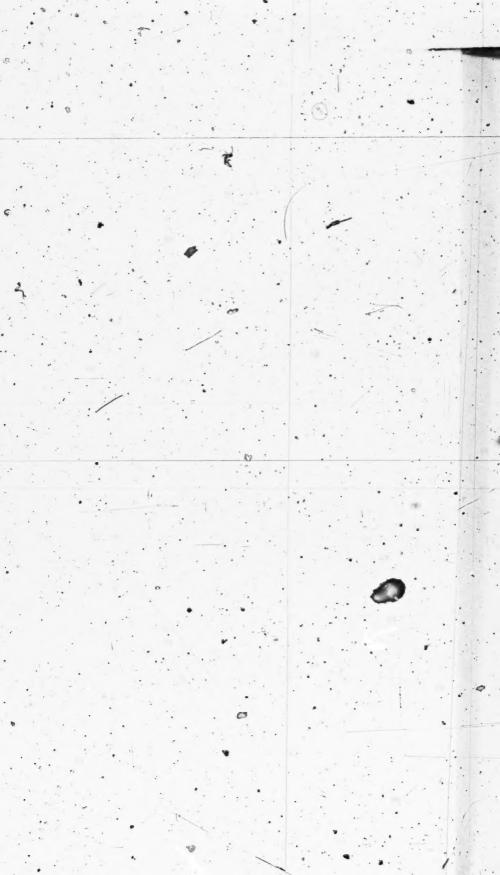
Respectfully submitted,

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JAMES L. GOLDWATER,
ARNOLD G. MALKAN,
of Counsel.



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IN THE

Supreme Court of the United States were and the

OCTOBER TERM. 1947 Nos. 366-367

BAY RIDGE OPERATING CO., INC., Petitioner,

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

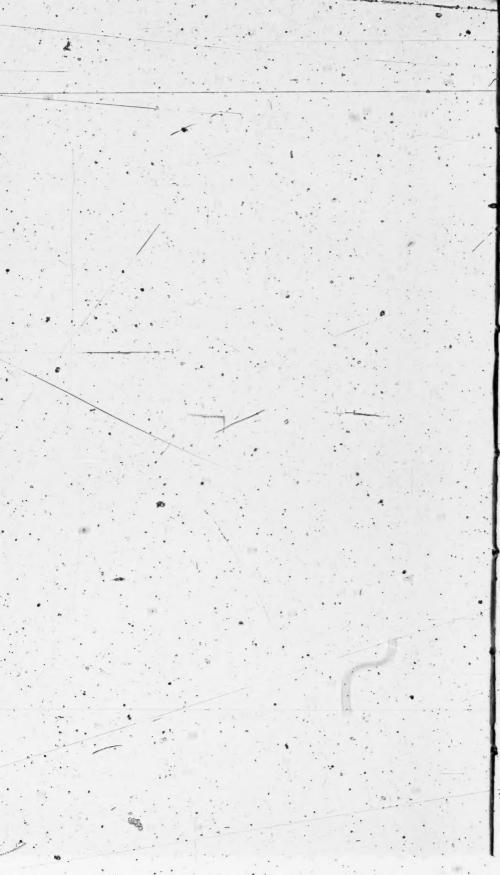
> HURON STEVEDORING CORP., Petitioner.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

MOTION AND BRIEF ON BEHALF OF THE INTERNATIONAL LONGSHOREMENS ASSOCIATION (A.F.L.) AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

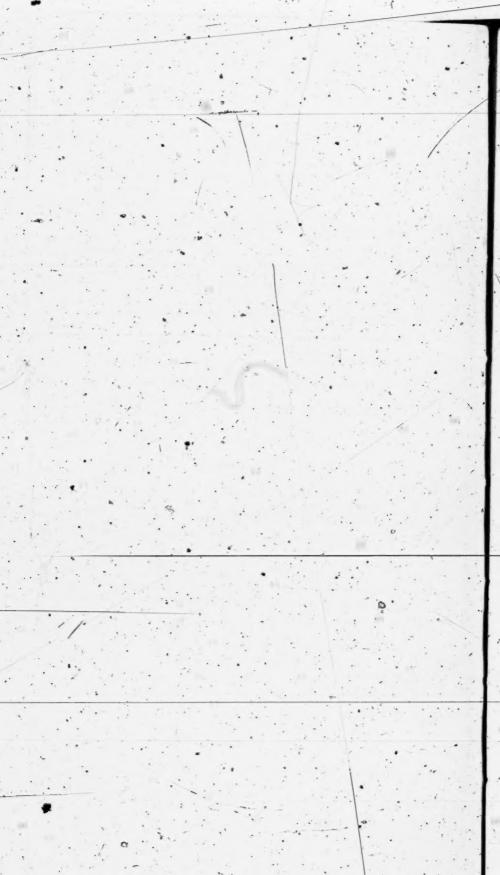
> INTERNATIONAL LONGSHOREMENS ASSOCIATION. Amicus Curiae.

LOUIS WALDMAN, Of the New York Bar. Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING Co., INC., Petitioner,

12.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

No. 367

HURON STEVEDORING CORP.,

Petitioner.

v

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Now comes the International Longshoremens Association (A.F.L.), by its attorney, and respectfully moves for leave to file the attached brief as Amicus Curiae in the above-entitled cause, in support of the petitioners' petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. As grounds for said motion, movant shows:

- 1. The International Longshoremens Association, hereinafter referred to as the LLA, an unincorporated association, is a labor union affiliated with the American Federation of Labor. It consists of some 500 locals in the ports of the United States and Canada, with a membership of approximately 80,000. Its membership in the Port of New York numbers approximately 30,000. The plaintiffs are longshoremen in the Port of New York and are members of the LLA. The LLA, through its affiliated locals, is the collective bargaining agency for its members. The LLA has been negotiating and making collective bargaining agreements with employers governing the wages, and terms and conditions of employment of its members for more than 30 years. For this reason it has a vital interest in the subject matter of this case.
- 2. The petitioners, by the Solicitor General, have filed herein a petition that Writs of Certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, which reversed a judgment in favor of the defendants entered by the United States District Court for the Southern District of New York. The movant, the I.L.A., is desirous to support that petition.
- 3. The Solicitor General, as counsel for the petitioners, has given his consent to the filing of this brief. Counsel for the plaintiffs-respondents herein, has refused his consent.
- 4. Special reasons in support of this motion are set out in the accompanying brief.

Respectfully submitted,

Louis Waldman, Counsel for.

International Longshoremens Association,
A.F.L.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING Co., INC., Petitioner,

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

No. 367

HURON STEVEDORING CORP.,

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LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

BRIEF ON BEHALF OF INTERNATIONAL LONG-SHOREMENS ASSOCIATION (A.F.L.) AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETI-TION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Interest of the International Longshoremens Association

The International Longshoremens Association (A.F.L.), hereinafter referred to as the I.L.A., supports petitioners' application for Writs of Certiorari herein, because under the decision of the court below, the economic and social gains it has made for its membership as a whole over a period of 25 years would be seriously undermined. Its capacity to negotiate and reach agreements in good faith for the betterment of the general conditions of its members, including the fixing of wage scales and overtime rates which in this industry are over and above and superior to the standards set by the Fair Labor Standards Act, would be destroyed. Elements of uncertainty would be introduced into the processes of collective bargaining. The promises of the parties solemnly entered into and relied upon in working out an industrial code for the industry, would no longer have that moral authority and economic predictability which is a basic and essential requirement for effective pursuit of the processes of collective bargaining.

The rates of pay agreed upon between the union and the employers in the Port of New York, as evidenced in written contracts going as far back as 1916, demonstrate the evolution of an industrial relationship between a strong well-organized labor union on the one hand and a strong well-organized group of employers on the other. The union vigorously pursuing a course calculated to improve the standards and conditions of employment of its members, and the organized employers acting, in their own interest, through the New York Shipping Association, have, through the years, built an efficient and prosperous industry capa-

ble of yielding a reasonable profit to the owners, and those ever higher levels of wages and working conditions which the units has demanded and secured over the years.

The union negotiates agreements with the employers for

8 general classifications of employees. The agreements

cover the following general classifications: General Cargo; Cargo Repairmen: Checkers; Clerking; Port Watchmen; General Maintenance Workers; General Mechanic and Miscellaneous Workers; Horse and Cattle Feeders, Grain Ceilers and Marine Carpenters. These 8 agreements take up 54 pages of small type in the booklet entitled "Agreements Negotiated by the New York Shipping Association with the International Longshoremens Association Effective October 1, 1943," which forms a part of Defendants' Exhibit A. The agreement which was considered in the above-entitled cases was the General Cargo Agreement.

The basic scale of wages under the 1943 General Cargo Agreement, ranged from \$1.25 per hour to \$2.50 per hour. These were the straight time hourly rates. The overtime hourly rates provided for in the agreement ranged from \$1.87½ to \$3.75. The overtime hourly rates were fixed in this agreement, as indeed, in the collective agreements which preceded and followed it, at one and one-half times or 150 percent of the contract straight time hourly rate (except for some negligible classification where there was a very slight deviation).

In 1916 the General Cargo Agreement provided for basic straight time hourly rates of \$.40 and overtime rates for night work of \$.60 per hour. The basic hourly rate for explosives was \$.80 per hour.

Wage scales are of course not the be all and end all of a collective bargaining agreement. Like most collective agreements negotiated by strong unions, the 1943 agreement also contains items dealing with the health, comfort and convenience of the workers, items dealing with human rights on the job as against the arbitrary powers of management, and items concerning machinery for arbitration. The 1943 General Cargo Agreement covers 15½ pages of small print in the booklet referred to supra.

It contains a provision for the preferential shop.

It fixes basic working hours and provides not merely for a maximum working week, but for a maximum basic working day.

It specifies meal hours and prohibits work during such hours, except for certain emergencies.

It provides for legal holidays.

It then sets forth that

"straight time rate shall be paid for any work performed from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M. Monday to Friday, inclusive, and from 8 A.M. to 12 Noon Saturday. All other time, including meal hours and the legal holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate. The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until men are relieved."

The agreement then sets forth the wage scales for 8 types of cargo. For each of these 8 types, it provides a straight time hourly rate and an overtime hourly rate, which is 150 percent of the straight time hourly rate.

It will be observed, therefore, that the collective agreement provides for overtime pay, not merely for hours worked in excess of the basic working week, but for all time worked outside of certain specified daytime hours.

Provision is then made that the employer shall supply certain work necessities and for regular and convenient payment of wages.

"Shaping time", a mode of employment peculiar to the longshore industry, is regulated. In order to prevent, insofar as can be done, abuse of the "shape" as a form of hiring, the contract provides that under certain conditions a worker who is chosen at the "shape" must be paid a minimum of either 2 or 4 hours pay, as the case may be.

There is a provision for suitable shelter during bad weather.

Then follow almost two pages regulating the minimum number of men in gangs loading and discharging various types of cargo, with a provision for immediate ruling on any disputed cases that may arise under this clause.

As a protection to the health of the workers, there are provisions concerning the maximum weights which may be lifted with and without the use of machinery. Similarly the agreement requires that the employer furnish clean drinking water and adequate sanitary facilities to the men; prohibits the use of intoxicants; and makes provision against shirking or pilfering.

There is a pledge that neither party to the agreement will discriminate against members of the other party.

Elaborate provision is made for arbitration of all disputes which may arise under the agreement.

The agreement here so briefly outlined, reflects the aspirations of the inembership of the I.L.A. through the years. The increase in wages between 1916 and the date of this agreement, is paralleled by a reduction in working hours. The 1916 agreement provides for a ten hour day, while this agreement provides for an 8 hour day. The 1916 agreement covers 1½ typewritten pages. This agreement covers 15 printed pages. Through the quarter of a century that passed between the writing of the 1916

and the 1943 agreements, the union was building up, through the collective agreements, a code of labor relations in the interest of its members. No separate part of that code stands by itself. No separate part of that code was negotiated and won by the union without reference to and relationship to the other parts. No part of that code so painfully built through the years, was granted by the employers without reference to and relation to the other parts. The developing character of the agreement through the years, its growing concern with matters in addition to wages, the extension of its protections over more and more aspects of the workers employment, reflects the processes of collective bargaining at their best.

In these agreements, over the years, the union fixed the basic and regular rates of pay, and the overtime rates, and they were understood to be the regular rates of pay and the overtime rates of, pay by the parties to the agreements. Here was no development forced upon the union and the employers by the Act, but by the collective strength of the workers through the LLA.

Overtime was fixed at time and one-half the regular rates. No intricate computation to arrive at the overtime was necessary. The rates were clearly set forth, and no member of the union has ever expected overtime on overtime. No employer has ever expected that there would be a demand for it.

The union, speaking for its entire membership, cannot allow some of its members to repudiate individually an agreement as to what constitutes regular and overtime rates to which they, together with their fellow workers jointly agreed through the orderly processes of collective bargaining over a long period of years. For the union

to stand by idly when such repudiation is attempted, would be to destroy the very foundation of bona fide collective bargaining.

The basic rates here involved are far higher than those required by the Fair Labor Standards Act. Without collective bargaining these very plaintiffs who now seek overtime on overtime rates ranging up to \$3.75 per hour during the period in suit might, like millions of other American workers, still be working at the \$.40 per hour minimum provided by the Act.

The present agreement between I.L.A. and the New York Shipping Association expires by its terms in August, 1948. One need not be a prophet to expect that the employers will not be ready to renew an agreement which, if the decision of the court below should stand, will have the effect of causing them to pay overtime on overtime. Indeed when it became known in 1945 that such a suit as the one now in question would be filed, the employers insisted upon inserting in the agreement a provision for renegotiation in the event that the overtime arrangements in this industry should be construed by the courts in such a manner as to negate the intent of the parties. The union resisted such a clause, but finally was compelled, as a part of the price of securing agreement, to assent to its inclusion.

The members of the LL.A. well know what disaster such renegotiation may bring to them and how greatly they can be harmed if the overtime provisions which they have fought for for so many years and which are so far superior to the requirements of the F.L.S.A. should be changed. (See testimony of Joseph P. Ryan, president of the I.L.A., Record, 167-197.)

The trial court fully appreciated the danger, stating, in its opinion:

"It is clear that the application of either of plaintiffs' formulae to the Nation's wage bill retrospectively would create havor with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry. -

"Such catastrophic results are inevitable once we accept plaintiffs' underlying premise-that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live."

(Record, 586)

The danger to the longshoremen is real—and immediate. The very foundations of free collective bargaining are threatened—and we cannot believe that it was the purpose of Congress that the F.L.S.A. should be construed so as to make it such a threat.

It is a matter of historical record that it was the labor movement, of which the I.L.A. is a part, which was the prime mover in securing, first by collective agreement, and then through the reinforcement of law, a floor under wages and a ceiling over hours. The Fair Labor Standards Act was finally passed by Congress as the result of a public opinion which demanded for the unorganized workers at least some of the gains which had been won by organized labor.

It is inconceivable that it was the intent of organized labor, in supporting such legislation, to have it supplant free collective bargaining, or that it was the purpose of Congress that the standards set by such legislation should supplant the superior standards previously set by collective bargaining.

Congress, in passing the Fair Labor Standards Act, had for its overall purpose advancement of the social and economic position of labor by setting a floor under wages and a ceiling on hours. But, surely, it never contemplated that the law should be so construed as to hurt labor.

In the longshore industry particularly would workers be hurt by such a construction of the Act, because it would cut the groundwork from under those clauses of their agreements which were especially designed to meet the problems of their industry and to meet their problems as workers in that industry. For example, the longshore industry unfortunately does not provide steady employment for its workers. All too often it does not provide a full week of work. Under the agreements which the longshoremen have won for themselves, under the agreement which the plaintiffs ask this court to ignore, a longshoreman working from noon to 8 P.M. three days in the week for a total of 24 hours, will receive not 24 times the basic hourly rate of pay, but will receive instead 30 times the basic hourly rate of pay. Thus workers who find themselves, because of the peculiar conditions of the longshore industry, in the position of having to work 7 or 8 hours a day for a total of less than 40 hours a week, nevertheless secure overtime pay for a considerable portion of the hours they do work. As the trial court found: "There was 8.50 times as much contractual 'overtime' as there was overtime, measured by the number of hours in excess of 40 worked for one employer (Record, 607). It is this economic gain, among others, which is threatened.

The union, ever since its existence, and by written contract since 1916, has consistently fought to maintain payment of overtime for all work done outside of the specified regular daytime hours.

This type of overtime pay is not peculiar to the long-shore industry; there are thousands of collective agreements in which overtime is likewise provided for time worked outside regular daytime hours. In the longshore industry, however, the peculiar nature of the industry makes such a provision especially important, for in the longshore industry there is constant pressure on the employers to work around the clock.

To make it possible for its members to live normal lives like their fellow citizens, to work during the hours when other men work, to spend time with their families, the union has had to resist this pressure consistently. It has placed high penalty overtime rates on all hours outside the day-time hours, so as to make around the clock work too expensive for the employers, except in case of absolute need. This device has proved successful in concentrating long-shore work during the regular daytime hours.

The trial court found, as a fact, that concentration of work during the basic working day was almost 8 times as great as during the other 16 hours of the day from 1932 to 1937. During the 10 months' period from passage of F.L.S.A. to shortly before the outbreak of the war, this concentration was 6 times as great. Even during the last full war year, when pressure of round the clock work was greatly increased, due to the need of getting ships out of the port as quickly as possible, concentration of work was 2.4 times as great during the daytime hours as during the other 16 hours of the day (Record, 608).

If the decision of the Circuit Court of Appeals should stand, this concentration of work during the daytime hours, for which the union has so long fought, would be menaced.

It must be recognized that it is difficult enough for a union, in negotiations with its employers, to secure for its

members conditions which are an advance upon those which generally prevail in American industry, even where its position on the merits is unassailable. It would be far more difficult for the union to secure such conditions when the employers can point to a law that piles a statutory penalty on a penalty for overtime already exacted by the workers.

The I.L.A. and its members should not be placed in the position of having to resist the employers' demand for a revision of the overtime provisions in the contract.

The Issue

The ultimate issue involved in these cases, is whether the "straight time" rates of pay for the basic working day as defined in the collective bargaining agreement between the New York Shipping Association and the L.L.A., are regular rates of pay within the meaning of the Fair Labor Standards Act.

During the period in suit, if a man worked 41 hours, 39 of them within the basic working day, and 2 hours outside the basic working day, his compensation was 39 times the straight time hourly rate plus two times the contractual overtime rate. If a man worked 41 hours, all of them outside the basic working day, he was compensated for all 41 hours at the contractual overtime rate.

The District Court in its opinion, held that "the collectively bargained agreement established a regular rate" (Record, 591) and concluded, that the "straight time" hourly rates set forth in the collective bargaining agreements constituted the "regular rates" at which respondents were employed and that the employers had complied with the requirements of Section 7a of the Fair Labor

Standards Act, except in certain minor respects, which are not in dispute (Record, 617).

The court below disagreed with the trial judge. While holding that his findings "are supported by the evidence", it reversed him, and set up a different "regular rate" of pay than that provided in the contract.

Specification of Errors to Be Urged

1

The court below erred in failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, in which respondents and other longshoremen were employed during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7a of the F.L.S.A., for the reasons that follow.

(a) As a matter of law, the I.L.A. and the employers had a right to contract for a regular rate and an overtime rate so long as it was not less than the statutory 150 percent of the regular rate. Employer and employee may establish the regular rate by contract. Walling v. A. H. Belo Corp., 316 U. S. 624, 631. Public policy favors collective barganing. 29 U. S. Code, Sec. 151. Labor Management Relations Act of 1947. It follows as a matter of public policy, therefore, that the employer represented by his trade association and the employee represented by his union, may establish the regular rate by contract.

Moreover, Congress in the F.L.S.A., indicated its belief that the unions have a protective function with respect to their members, upon which Congress was willing to rely. Thus, in Section 7b, which provides for certain exemptions from the overtime provisions of the Act, these exemptions apply not where individual contracts have been entered into by the employer and employee, but only where collective agreements with a bona fide union have been entered into.

(b) The provisions of the agreement measuring overtime by all hours worked outside of certain specified daytime hours was consonant with the purpose of Congress, and effectuated the purposes of the Act.

The Supreme Court has stated that the Act had a "dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long work week". Walling v. Youngerman Reynolds Hardwood Company, 325 U. S. 419, 423.

From the very beginning of American industrial history, organized labor fought for the shorter working day and its chief device toward that end was the establishment of a punitive rate—generally 150% of the regular rate—for overtime (Record, 328, 421, et seq.). Congress did not, with the passage of the F.L.S.A., introduce a new concept into American industry but adopted a concept which was already firmly rooted in the unionized trades, namely that a premium of 50% for overtime work would act as a deterrent to working a long day or a long week, and would compensate the employees for the burden of a long work week.

It could not have been the purpose of Congress to supplant overtime arrangements already a part of the American industrial pattern, which also had as their objective the imposition of a penalty premium of 50% on overtime as a deterrent to working a long day or a long week, but rather to introduce this means of controlling the long day or long week, where the penalty premium was not already in effect.

Moreover, Congress must be presumed to have known that the unionized trades had, over a period of years, worked out overtime arrangements which were more favorable to the workers in them, than the 50 percent penalty premium on excessive hours—that for example some unionized trades imposed a penalty premium of 100 percent on overtime hours and that a number of the . best organized trades imposed penalty premiums not merely for excessive hours but for hours outside of a regular or normal, or basic working day. It could certainly not have been the purpose of Congress that the F.L.S.A. be so interpreted as to place additional statutory overtime penalties on industries which had already granted to their employees, as a result of union insistence, more favorable overtime provisions than the statute was to provide. The purpose of Congress was to limit the working day by imposition of a penalty premium of 50 percent for overtime. The trial court found as a fact, that in the Port of New York, "the 50 percent overriding charge for work done during 'overtime' hours, is a deterrent because of the added cost "" and that "the steamship companies in the Port of New York, have preferred to confine the handling of cargo to 'straight time hours' to the greatest possible extent" (Record, 603).

The trial court further found that "the objective of organized labor has been to shorten the total number of weekly hours . A mechanism for accomplishing this result has frequently been to schedule an approved tour of daily hours to be compensated for at a straight time rate and to classify all other hours as overtime hours compensated at an overtime rate. The employment of the 50 percent premium for such overtime hours, was designed to constitute a deterrent and not a prohibition. Such 50 percent premium in the longshore industry has proved to be effective as a deterrent and is responsible for the high degree of concentration of longshore work in the Port of New York to the basic working day" (Record, 612).

The trial court's findings of fact based on statistical studies introduced into evidence, would also indicate that the overtime device used in the longshore industry tends to reduce hours of work and to cause the employment of more men. For example, the court found that during the 10 month period from October 24, 1938, the effective date of the F.L.S.A., to August 31, 1939, shortly before the outbreak of the war, only 8.05% of the longshoremen who worked in the Port of New York, worked more than 40 hours a week for one employer. Similarly the trial court found that the percentage of total hours worked for one employer, which is represented by work in excess of 40 hours per week, was 2.94 percent (Record, 607). Similarly, the court found that during the last full year of war experience before V.E. Day, 44.5 percent of total "overtime" man hours worked between 5 P.M. and 8 A.M. (exclusive of Sundays and holidays) was worked by men who had done no work previously during the straight time working day (Record, 607, 608).

All these figures lend irresistibly to the conclusion that the overtime device used in the longshore industry had the result of inducing the employers "to employ more men". Moreover, under the contract, the men were compensated for the burden of long hours at the statutory rate.

Thus the "dual purpose" of the Act has been achieved under the collective agreement in the Port of New York and the method of overtime compensation adopted in the Port of New York is therefore in consonance with the purpose of Congress.

(c) The basic working day of 8 daytime hours as set forth in the collective agreement, was the regular working day for the longshore industry, both by the intention of the parties and in actual fact.

The irregular character of work in the longshore industry has posed a constant challenge to the union to bring about as high a degree of regularity as possible. It has succeeded in doing so, by securing overtime compensation for hours worked outside the basic day time hours, so that there is a high degree of concentration of work during the daytime hours. In terms of the industry as a whole and in terms of the membership of the union as a whole (which is to say in terms of the New York longshore workers as a whole), these daytime hours have become the regular flours because all other hours worked required the payment of punitive overtime.

Thus during the years from 1932 to 1937, inclusive, work performed between 5 P.M. and 8 A.M., exclusive of Sundays and holidays, constituted 15.13 percent of the total man hours worked. For the ten months between the passage of the F.L.S.A. and August 1, 1939, shortly before the outbreak of the war, work performed between

5 P.M. and 8 A.M., exclusive of Stindays and holidays, constituted 17.89 percent of total man hours. Even during the war, work performed during these nighttime hours, amounted to only 25 percent of total man hours (Record, 606, 607).

As the Supreme Court stated in Walling v. A. H. Belo Corp., 316 U. S. 624, at pages 634, 635,

"the problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable and that which it was unwise for Congress to do, this court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act."

We respectfully submit that in the light of the facts in this case, it would require "an inflexible and artificial interpretation of The Act" to hold that the straight time daytime hours are not the regular hours within the meaning of the Act. The trial court was amply justified in finding that "the straight time hourly rate" constituted the regular rate at which plaintiffs were employed "" (Record, 617).

H

The court below also erred in failing to hold that payment of one and one-half-times the "straight time" rates set forth in the collective bargaining agreements for all work performed outside the 40 basic hours—the "straight time hours"—in any work week in the period in suit satisfied the requirements of Section 7a of the F.L.S.A. with respect to payment of overtime compensation, for the reasons that follow:

(a) The contractual overtime rate was a true overtime rate by whatever test may be applied and therefore not the regular rate. As already pointed out, it had the effect of shortening the working day. It was a punitive rate. As the Trial Court found, "stevedoring companies never worked any more 'overtime' than was necessary, because it was more economical for the steamship company and more profitable to the stevedores to work during 'straight time hours'". (Record, 602)

By the test of the parties' intention, it was a true overtime rate, for as the testimony shows, over a-period of years, both the union and the employers in their negotiations and in their communications to their members, treated the night rate as an overtime rate (Record, 434, et seq.).

In this connection, it must be remembered that labor negotiations are usually carried on by laymen and not by lawyers and that their contracts are not always drawn with legalistic precision, but these laymen know what they are negotiating about and whether the terms they use be precise or imprecise, they know what these terms mean.

In point of fact, night rates were referred to as overtime rates in the collective agreements between the years f919 and 1929. They were again referred to as overtime from 1938 on. Since the contractual rate was a true overtime rate, it could not be the regular rate.

(b) The contractual overtime rate was not a shift differential, as contended by respondents, and therefore there was no basis for holding it to be a regular rate. The attempt to convert the contract overtime rate of 150 percent of the regular rate, into a shift differential does violence to the statute and is as erroneous as it would be to convert a shift differential into an overtime premium.

There is a clear distinction and a vast difference between the two in the industrial life of our country. The record.

shows and the trial judge found that: ,

"A shift differential is a premium payment for work in either the second or third shift in a plant or industry where more than one shift is worked. The shift differential for the second shift is usually 5 cents or 10 cents per hour, and seldom exceeds 15 cents per hour.

1. It is perhaps important to note that the court below may have been laboring under a misapprehension concerning the significance of the use or failure to use the word "overtime" in the collective agreements. In the opinion of the court below appears the following:

The annual collective agreements made with this union since 1921 have provided for a 'basic working day' of eight hours and a 'basic working week' of forty-four hours. Beginning in 1918, these agreements fixed two sets of hourly rates: (1) Specified hourly rates were set for 'work performed from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M., Monday to Friday inclusive, and from 8 A.M. to 12 Noon Saturday.' (2) With a few exceptions, one and one-half times these rates, were fixed for what the agreements called 'all other time.' In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the agreement changed the labels for these respective periods: The first was now called 'straight time'; the second was now called 'overtime rates.' This nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits. No other significant changes were made in the agreements after the Act went into effect."

It would appear, to judge from this quotation, that the court below was maware of the constant use of the word "overtime" in the agreements between the parties from 1919 to 1929. (See Agreements from 1916 to 1943 forming part of Defendants' Exhibit A.)

"There is a difference between a shift differential and overtime premium. The former is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. The latter is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50 per cent of the normal rate." (Record, 605-606).

The Court below held that the findings of the trial judge are supported by the evidence in these words:

"In the instant case, the 'actual fact' concerning the 'regular rate' appears in the findings of the trial judge which are supported by the evidence and which we understand the defendants do not dispute." Reported at 162 F. 2d 665.

(c) The intention of the union and the employers to set up a true overtime rate as distinguished from a regular rate can be seen not only from the intrinsic nature of the agreement itself, and the history of the agreements, but from the contemporaneous acts of the same negotiating committees when they deliberately provided different treatment where true shifts and not overtime was involved.

Under the system of collective bargaining which prevailed, the negotiating committee for the I.L.A. and the employers negotiated and concluded eight different agree-

ments dealing with different crafts. (See booklet, "Agreements negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of Greater New York and Vicinity, effective October 1, 1943", which forms a part of Defendants' Exhibit Ac.) Among those crafts was one having to do with Port Watchmen, who are members of a local of the I.L.A. Unlike services of the workers covered by the General Cargo Agreement involved in this suit, and the other agreements, the services of the Port Watchmen are regularly required around the clock. The terms and conditions for this large section of the membership of the I.L.A. were negotiated contemporaneously with the negotiation of the General Cargo Agreement by the same committees for both the union and the employers. Here the parties desired to provide for shifts. Accordingly, they negotiated an agreement-as they had done in previous years-setting up three regular shifts. The parties there used language common to industry, and provided as follows:

"The basic working day shall consist of three shifts of eight (8) hours each, from 8 A.M. to 4 P.M., 4 P.M. to 12 Midnight, and 12 Midnight to 8 A.M. (See page 33 of booklet of Agreements referred to, supra.)

They provided for the same rate of pay for each of the shifts, without any differential in pay whatever, but provided for overtime at time and a half for hours worked outside the regular shifts, whether such hours were in excess of 40 or not.

The parties knew the difference between the branch of work in their industry where shifts were regularly worked, and where there were no shifts.

There is, of course, no element of regularity in night work in the longshore industry of such a nature as would justify calling night work a shift. As the trial court found: "The amount of work which may be available for long-shoremen in the Port of New York, and the time of the day, or the day of the week when said work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week and season to season" (Record, 601), and "the casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique" (Record, 599).

III

The court below further erred in its application to these cases of the pertinent decisions of the Supreme Court. None of the cases relied on by the court below, have a substantial factual relationship to the instant cases.

In Walling v. Youngerman Reynolds Hardwood Company, 325 U. S. 419, the court found that the "regular rate" was never paid. In our cases, no matter how the regular rate be defined, it is clear that it was paid to everybody who worked in the industry.

In Walling v. Harnischfeger Corporation, 325 U. S. 427, the question involved was whether the incentive rate above the basic rate should be included in figuring overtime. The rule in the Harnischfeger case therefore would apply to the instant cases only if the night rate was conceived to be an incentive rate for the purpose of securing greater pro-

duction—a contention that has at no time been advanced by the plaintiffs.

In Walling v. Helmerich & Payne, 323 U. S. 37, the question of a split tour of duty was involved, so that the court was led to observe "only in the extremely unlikely case where an employee's tours total more than 80 hours a week, did he become entitled to any pay in addition to the regular tour wages" previously received and further, at page 40, "the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received". There is no contention in our cases that any rate in controversy is a fictitious rate.

149 Madison Avenue Company v. Asselta, 331 U. S. 199, presents a set of facts which bear no relation to those in our case. There is a wide degree of difference as is indicated by the language of the Supreme Court at page 209:

the agreement in this case was one calling for a work week in excess of 40 hours, without effective provision for overtime pay until the employees had completed the scheduled work week and that the 'hourly rate' derived from the use of the contract formula, was not the 'regular rate' of pay within the meaning of the F.L.S.A."

In referring to the Asselta case the court below said:

"As recently as May of this year, the Supreme Court, in a unanimous opinion by Chief Justice Vinson—confirming what had been said previously by this Court and by several other inferior courts—decided that the Belo case doctrine must be limited to agreements which contained a 'provision for a guaranteed weekly wage with a stipulation of an hourly rate', and that other types of agreement, whether or not a result of collective bargaining, cannot, by their terms, determine what is the 'regular rate' named in the Act. That 'regular rate',

said the court, is an 'actual fact'. See 149 Madison Avenue Company v. Asselta, — U. S. — (May 5, 1947)". Reported at 162 F. 2d 665.

We respectfully submit that the court below erred in its reading of the Asselta case.

Overnight Motor Transportation Company v. Missel, 316 U. S. 572, presented a situation where the employees worked irregular hours at a fixed weekly wage and the question was one of computing their hourly rate from their weekly rate. But in our case, no such computation is involved, since the hourly rates are specified.

The court below apparently gave some sweight Cabunac v. National Terminals Corporation, 139 F. 2d 853 (C.C.A. 7) (Record, 657-658). But in the Cabunac case the primary issue concerned a 1,000, hour clause under Section 7b of the Act and the court held that the 1.000 hour clause did not constitute an allowed exemption from the overtime provisions of the Act. Moreover, the language of the Seventh Circuit Court in the Cubunac decision referred to a situation where the differential between the regular rote and the so-called overtime rate was 17 percent-only 10 cents per hour. The court's opinion there, therefore, says that "it seems evident to us as it did to the District Court, that the 'overtime' rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workmen's standpoint. and that this rate is the 'regular rate' to be paid for work on the night shift". This would appear to be a case of a shift differential and sheds no light on a situation such as ours where the difference between the day rate and the night rate was 50 percent, and where the trial judge found as a fact that there is a vast difference between a shift differential and a 50 percent overtime premium (Record, 605, 606).

- 1. The instant cases present issues which have not before been passed on by this court. These issues are of far-reaching consequence, not only in the longshore industry, but in other industries with like collective bargaining histories and contracts, and an early determination by this court of the issues involved, would appear to be in the interest of sound and peaceful labor relations.
- 2. Review of the judgments below is necessary because in our view the decision below is incorrect in that it failed to give proper weight to a bona fide collective agreement and assimilated the employer employee relations in the longshore industry to situations where there had been either:
 - a. A taint of attempted evasion of the F.L.S.A.; or
 - b. Overtime compensation arrangements which were entered into after the Act went into effect and which were astutely devised to retain prior rates of pay.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitioners' petition for writs of certiorari should be granted.

Respectfully submitted,

International Longshoremens Association,
. Amicus Curiae.

Louis Waldman,

Counsel.

State of New York County of New York Ss.:

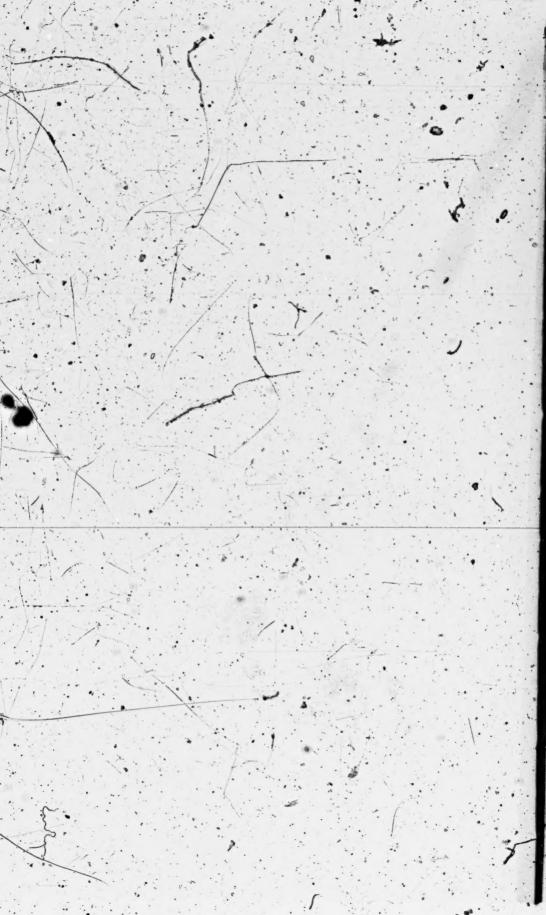
Before me the undersigned authority for said County in said State personally appeared Charles H. Green who, being by me first duly sworn stated on oath that on this day of October, 1947, he deposited in the United States mail copies of the foregoing Motion and Brief correctly addressed to Philip B, Perlman, Solicitor General, Department of Justice, Washington 25, D. C., counsel for the Petitioner, and to Max R. Simon, Esq., 225 West 34th Street, New York City and to Goldwater & Flynn, Esqs., 50 East 42nd Street, New York City, attorneys for Plaintiffs-Respondents.

CHARLES H. GREEN.

Sworn to and subscribed before me this day of October, 1947.

VINCENT F. O'HARA
Attorney and Counsellor-at-Law
Residing in Bronx County
Bronx County Clerk's No. 2
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IN THE

Supreme Court of the United States

Остовин Тивм, 1947.

Nos. 366-367.

BAY RIDGE OPERATING Co., INC., Pelitioner,

JAMES AABON, BT AL., Respondents.

HURON STEVEDORING CORP., Petitioner,

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST AS AMICUS CURIAE.

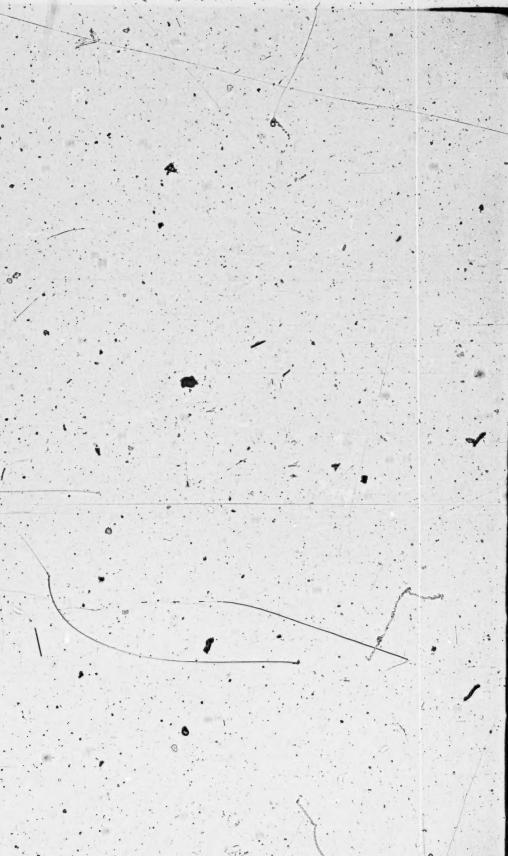
WATERPRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST

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MOTION OF THE WATERFRONT EMPLOYERS ASSO-CIATION OF THE PACIFIC COAST FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

The undersigned, as attorneys for Waterfront Employers Association of the Pacific Coast, respectfully move this Honorable Court for permission to file the attached brief on behalf of the Waterfront Employers Association of the Pacific Coast as Amicus Curiae in support of petitioners' position in the above-entitled cases.

Counsel for petitioners herein has consented to the filing of this brief. Counsel for the respondents has refused to grant consent.

Waterfront Employers Association of the Pacific Coast, referred to herein as the Employer Association, is a non-

profit corporation formed and existing under the laws of the State of California, representing its members in matters of collective bargaining with labor organizations acting for longshoremen and other shoreside workers in the shipping industry on the Pacific Coast and, as such, is party to numerous labor contracts containing provisions concerning wages and hours similar to those involved in the above entitled cases.

Sixty-three suits are pending in the United States District Courts in and for the Districts of Washington, Oregon, Northern California and Southern California on behalf of about 1400 claimants against members of the Employer Association in which contentions are made similar to those made by respondents in said cases now pending in this Court, and decision of which will turn upon questions of law to be determined herein by this Court.

The Employer Association on behalf of its members is party to labor agreements affecting some one hundred some one hundred some one hundred some of the hundred some of t

This motion is based upon the foregoing grounds and the additional matters set forth in the accompanying brief.

Respectfully submitted,

WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

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JAMES AABON, ET AL., Respondents.

HURON STEVEDORING CORP., Petitioner,

LEO BLUE, ET AL., Respondents.

BRIEF OF THE WATERFRONT EMPLOYERS ASSO-CIATION OF THE PACIFIC COAST AS AMICUS CURIAE.

The reasons for filing this brief appearing in the motion for leave to file will not be repeated.

PRELIMINARY STATEMENT.

Waterfront Employers Association of the Pacific Coast has a membership of firms engaged in the steamship, terminal or stevedoring business on the Pacific Coast of continental United States which are the employers of

¹ As stated in the motion annexed, Waterfront Employers Association of the Pacific Coast is a non-profit corporation, formed and maintained under the laws of the State of California and is referred to herein as the Employer Association.

For many years past the Employer Association and its predecessors have represented members in the negotiation, execution and administration of collective bargaining contracts with labor organizations representing longshorement and workers in related activities and is now party in such capacity to about twenty-one collective bargaining agreements.

The International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, as collective bargaining representative of workers, is party to eighteen such agreements. International Longshoremen's Association, affiliated with the American Federation of Labor, as collective bargaining representative of other groups of workers is party to three such contracts.

As in the Port of New York, waterfront employers on the Pacific Coast have paid wages in compliance with contract provisions on the assumption that overtime rates of pay under the contracts were time and one-half the "regular" rates of pay required by Section 7(a) of the Fair Labor Standards Act.

In the years 1945-1946, numerous suits were filed in United States District Courts on the Pacific Coast against members of the Employer Association. Those pending in the Northern District of California have been tried and are now pending on briefs prior to submission. The others await trial. In all these cases, the theory of plaintiffs is that advanced herein and upheld by the decision of the Circuit Court of Appeals for the Second Circuit, to wit, that overtime rates paid in this industry for work performed outside of the normal workday and workweek established by contract are "regular" rates of pay within the meaning of Section 7(a) of the Fair Labor Standards Act.

If this Court shall affirm the decision of the Circuit Court of Appeals, members of the Employer Association will be threatened with innumerable other claims of like character in amounts impossible to foretell.

SUMMARY OF FACTS.

The facts in these cases are fully set forth in the petitioners' brief. In the interests of brevity only a few basic facts are set orth herein.

The collective bargaining agreements in the stevedoring industry is in many other industries, establish a "basic" workday and workweek during which a specified rate is paid. All other time is designated "overtime" and is payable at time and one-half the rate payable for the "basic" workday and workweek. In normal peace times, a vast majority of longshore work is performed during the "basic" workday and workweek although some work is performed from time. to time in "overtime" hours; the amount of "overtime" having been considerably higher during the war period. As in other industries, employers and unions alike have always intended and considered the rates payable for the "basic"? workday and workweek to be the "regular rate" of par within the meaning of the Fair Labor Standards Act and have credited contract "overtime" against their statutory. obligation. The respondents contend, and the Circuit Court of Appeals has held, that contract "overtime" rates in this industry are part of "regular rate", within the meaning of the Fair Labor Standards Act, even though the result of bona fide collective bargaining and with no intent to evade the statutory obligation.

SUMMARY OF ARGUMENT.

I. The Circuit Court of Appeals erred in holding this Court has determined that except under the limited circumstances present in the *Belo* case, the parties cannot by collective bargaining agreement fix the "regular rate" of pay, within the meaning of the Fair Labor Standards

Act. This Court has not heretofore considered the precise issues before the Circuit Court of Appeals but, contrary to the opinion of the Circuit Court of Appeals, it has consistently reaffirmed the principle that the fullest possible scope should be given to collective bargaining agreements except where they constitute mere artifices or subterfuges to evade the law. Moreover, this conclusion is required by the intent of Congress as expressed in the legislative history of the Fair Labor Standards Act, by the Portal-to-Portal Act of 1947, and by our national policy.

* II. The Circuit Court of Appeals erred in holding that contractual overtime rates in the stevedoring industry constitute "regular" rates of pay, within the meaning of the Fair Labor Standards Act. "Regular rate" within the meaning of the Fair Labor Standards Act was not intended to include contractual overtime designed to prevent work outside the normal workday and workweek established by collective bargaining agreements. This is so even though contractual overtime is paid without regard to the forty hour limitation in the Fair Labor Standards Act and that it may not fully achieve its purpose to prevent such work. In the stevedoring industry the time and one-half rates payable for work outside the established workday and workweek have always been considered and . intended as such true punitive overtime and not regular rates. Further, they have achieved in large measure confinement of work to the regular hours established by the contract.

III. If the intent of Congress is doubtful, the doubt should be resolved in favor of petitioners since a contrary decision would threaten the foundation of collective bargaining, expose industry to ruinous claims and otherwise create serious injustice and inequity.

RGUMENT.

I. The Circuit Court of Appeals Erred in Holding this Court Has Determined that Except Under the Limited Circumstances Present in the Belo Case, the Parties Cannot by Collective Bargaining Agreement Fix the "Regular Rate" of Pay Within the Meaning of the Fair Labor Standards Act.

The decision of the Circuit Court of Appeals is based upon the assumption that under the decisions of this Court the collective bargaining agreements before it were entitled to no weight whatever in determining "regular rate" under Section 7(a) of the Fair Labor Standards Act. It held that the contrary doctrine declared in the Belo case was restricted to a contract for a guaranteed weekly wage with stipulated hourly regular and overtime rates.

The Court below apparently also held that a decision of this Court³ established that "the statutory test of regularity is met where a single principle or rule is uniformly applied in order to obtain the rate."

This Court has recently reaffirmed the doctrine of the Belo case (Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17) and, contrary to the assertion contained in the Circuit Court's opinion, that doctrine was not limited to contracts providing a guaranteed weekly wage.

In the Belo case (p. 631) this Court stated: 'But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract.'

Again it said:

"Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses

² Walling v. Belo Corp., 316 U. S. 624.

³ Overnight Motor Transportation Co. v. Missel, 316 U. S. 572.

where the work hours fluctuate from week to week and from day to day." (p. 635)

It is not suggested that the labor contracts involved here are unrealistic or artificial (Walling v. Helmerich & Payne, Inc., 325 U. S. 37). There is no claim that they are in ended to, or do, negate the statutory purpose. These contracts do not establish rates that are illusory because never paid as in Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, and the contracts are not of a character which are instruments for evasion of the law, Walling v. Harmischfeger Corp., 325 U. S. 427.

In rejecting the collective bargaining agreements of the parties the Court below has not only departed from the decisions of this Court but also from the Congressional intent in the Fair Labor Standards Act. As the District Judge found "The inevitable consequence of such a rule [as the plaintiffs urge] would be severely to restrict the scope of collective bargaining . . ." (R. 586) The Congressional intent in the Fair Labor Standards Act is expressed in the report of the House Committee which stated:

"The bill is intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining."

The report of the Senate Committee also stated:

"It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment wherever there can be any real, genuine bargaining between them."

and Chairman Norton who reported the bill in the Special Session explained:

"It is intended to protect employees who are not protected by collective bargaining."

⁴ H. Rep. 1452, 75th Cong., 1st Sess., Aug. 6, 1937.

⁵ Sen. Rep. 884, 75th Cong., 1st Sess., July 6, 1937.

^{6 82} Cong. Rec., p. 1990.

This Congressional intent was reemphasized in the Portal-to-Portal Act of 1947 (P. L. 49, 80th Congress; May 14, 1947) which states in the Findings and Policy that the Fair Labor Standards Act "has been judicially interpreted in disregard of long established customs, practices, and contracts between employers and employees" and if so interpreted "voluntary collective bargaining would be interfered with and industrial disputes ... would be created" and that, "it is hereby declared to be the policy of Congress ... (2) to protect the right of collective bargaining." The national policy of encouraging the collective bargaining process has also been recently reaffirmed in the Labor-Management Relations Act, 1947 (P. L. 101, 80th Congress, June 23, 1947).

The Court below in disregarding the collective bargaining agreements of the parties and the conditions and practices in the industry, and imposing a single rigid rule apart from agreement to determine regular rates of pay has clearly departed from the repeated statements of this Court that it was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single rigid form of wage agreement. Walling v. Belo Corp., supra, and 149 Madison Avenue v. Asselta, 331 U.S. 199.

It is respectfully submitted that the judgment of the Circuit Court should be reversed and the decision of the District Court reinstated to the end that collective bargaining contracts between employers and employees entered into in good faith without taint of intent to evade the law shall be upheld as establishing the "regular rate" of pay in accordance with the declaration by this Court that:

"When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it ..."

Walling v. Belo Corp., supra, p. 635.

II. The Circuit Court of Appeals Erred in Holding that Contractual Overtime Rates in the Stevedoring Industry Constitute Regular Rates of Pay, Within the Meaning of the Fair Labor Standards Act.

The basic issues in these cases are (1) whether overtime paid in accordance with union agreements for work outside the workday and workweek established as normal or regular by the agreements and paid without regard to whether such overtime is worked before or after forty hours a week is to be excluded from "regular rate", as that term is used in the Fair Labor Standards Act and (2) whether overtime rates in the stevedoring industry are to be so excluded. We think both questions must be answered in the affirmative.

(a) By every test it is clear that Congress did not intend the term "regular rate" to include contract overtime. The legislative history of the Fair Labor Standards Act reveals there was no discussion of the term "regular rate" by the Congress. This lack of discussion clearly demonstrates that Congress intended "regular rate" to be used in its ordinary accepted meaning. Moreover, this is a fundamental rule of statutory construction where Congress fails to define the terms of a statute. Old Colony Railroad Company v. Commissioner of Internal Revenue, 284 U. S. 552. See also, Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607.

In ordinary accepted meaning, the terms "regular rate" or "basic rate" are distinguishable from and do not in-

⁸ The Eight-Hour Law of 1912, as amended (37 Stat. 137, 54 Stat, 884; 40 U. S. C. A. 324 et seq.) as well as the Walsh-Healey Act (49 Stat. 2036; 56 Stat. 277; 41 U. S. C. A. 35 et seq.), as supplemented by Regulations of the Secretary of Labor, require time and one-half the "basic rate". The terms "regular rate" and "basic rate" have always been treated as synonomous. All stevedores who have contracts with the Government are required to pay time and one-half the "basic rate" for all work in excess of eight hours per day by reason of the Eight-Hour Law. This requirement has been considered satisfied by payment at contract overtime rates. There is no doubt that if the decision of the Circuit Court of Appeals is sustained, additional liabilities will be created under the Eight-Hour Law and the Walsh-Healey Act.

clude "overtime". This Court has so recognized by defining regular rate as the "hourly rate actually paid for the normal, non-overtime workweek." Walling v. Helmerich & Payle. 323 U. S. 87, 40, or, as "all payments... received regularly during the workweek, exclusive of overtime payments." Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 424. See also Overnight Motor Transportation Co. v. Missel, 316 U. S. 572; United States v. Rosenwasser, 323 U. S. 360; Walling v. Harnischfeger Corp., 325 U. S. 427.

Trade union agreements for more than a century have used the device of imposing an economic Analty of higher rates for "overtime" as a means of channeling the work into acceptable daily and weekly patterns as fixed by contract. The purpose of the unions in the penalty overtime device was to achieve a shorter workday and workweek in the interests primarily of health, efficiency and to spread employment. That this was their objective rather than securing increased pay, by working certain hours at "regular" time and additional hours at "overtime", is well established. Not only did Professors Taft and McCabe so testify at the hearings (R. 327-330, 338, 346-348, 419, 422-423) but these conclusions are supported by quotations from eminent authorities in this field which have been reproduced in Appendix A (p. 24) attached to this brief. the purpose of the trade unions was not to secure increased pay is further established by the fact, of which this Court may take judicial notice, that except in periods of temporary emergency or war periods, the actual hours of daily and weekly employment have steadily declined in this country over the last century.9

The purposes of labor unions in imposing an economic penalty for daily and weekly overtime are identical with the purposes sought to be achieved by the Fair Labor Standards Act. Indeed organized labors' drive for shorter

⁹ See also the table in Appendix B (p. 28) showing the decrease in the weekly hours of employment in manufacturing since 1909.

working hours was concurrently pressed by means of trade union agreements and legislation. This legislative program culminated in the Fair Labor Standards Act which was intended to protect workers not covered by trade union agreements. Since the overtime requirements of the fair Labor Standards Act were intended to complement contract provisions serving an identical purpose, it also follows that 'regular rate' in the Fair Labor Standards Act was not intended to include contract overtime.

The Administrator, Wage and Hour Division, has always recognized that the statutory requirements are met by contractual provisions requiring overtime without regard to whether paid for work before or after forty hours of work. Interpretative Bulletin No. 4 of the Wage and Hour Division has consisted by stated that contractual daily or weekly overtime may be credited against overtime payments due under the Fair Labor Standards Act.

The test of overtime, as distinguished from a shift differential, i centive payment or other type of "regular rate", is purpose—i.e. is it intended to prevent work outside or beyond the regular workday or workweek established by union contract. Whether required by law or contract overtime is permissive in nature, not prohibitive. Thus in dealing with the Oregon 10-hour statute this Court said;

"The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden and its adequacy for this was atmatter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission."

¹⁰ Sec. Shorter Hours, Marion C. Cahill, Columbia University. Press, 1932.

¹¹ Bunting v. Oregon, 243 U. S. 426, 436-437.

Labor unions might have prohibited all work beyond the established workday or workweek in their drive for shorfer hours out this was considered economically undesirable; the employer was to be permitted to exceed the established pattern when the exigencies of his business required it, provided only that he then compensated his employees at extra rates for the added burden. This is likewise true of the Fair Labor Standards Act (Overnight Motor Transportation Co. v. Missel, supra, p. 578). The permissive character of overtime and this Court's decision in Bunting v. Oregon thus reject any test whereby "overtime" is limited to cases where it is fully effective in preventing work outside: the established pattern. " . . . Its insufficiency cannot change its character from penalty to permission". Bunting v. Oregon, supra. Again this Court may take judicial notice that some overtime occurs at some times in all industries; the difference between industries is only one of degree. The adoption of any such test will accordingly affect all industries having such collective bargaining agreement at least for some periods.

Equally untenable is the contention that overtime must be limited to hours in excess of a given number. Obviously overtime paid for particular days, such as Sundays or holidays, is not overtime by reason of constituting work in excess of any particular number of preceding hours. Moreover, for many years many industries have considered as overtime all work performed before or after certain hours of the day without regard to whether a particular employee did any work during the regular hours on the same day. In Appendix C (p. 29) attached to this brief, we have collected citations from a number of published contracts in other industries for many years long antedating the Fair Labor Standards Act which like the steve-doring industry make overtime payable for all work outside designated hours.

Professors Taft and McCabe testified that agreements requiring overtime for any work outside specified clock

hours were generally prevalent in union contracts in the building, printing and metal trades and in scattered contracts in other industries covering cement and asphalt workers, stereotypers, brewery workers, automobile workers, retail delivery drivers, and boot and shoe, leather and furniture workers (R. 331, 339, 425-426).

More recently the Bureau of Labor Statistics¹² has stated that such contracts exist in the non-ferrous metal, automobile, canning and preserving, cotton textile, men's 'clothing, shipbuilding, tobacco, and trucking industries, as well as in the stevedoring industry.

It is accordingly clear that throughout industry generally, the term "overtime" was used in contradistinction to "regular" and employed for the purpose of preventing to the greatest extent practicable, all work outside the regular workday and workweek established by contract.

(b) In the stevedoring industry, management, labor and the public alike have always considered the approximately time and one-half rate payable for night, Saturday, Sunday, and holiday work to be an overtime rate and not part of regular rate.

Although the Circuit Court of Appeals referred to a change in terminology in the longshore contract in New York in 1938 from "all other time" to "overtime", an analysis of the contracts preceding 1938 will establish, as the Attorney General will undoubtedly show, that the terms "all other time" and "overtime" were used interchangeably in the New York contracts prior to 1938. Thus the time and one-half rate in New York was generally considered, by employers and the unions to be an overtime rate. The public press showed a like understanding in newspaper and trade journal accounts concerning negotiations between the International Longshoremen's Association and the New York Shipping Association in the years 1918-1936, some of which have been reproduced

¹² Monthly Labor Review, Oct. 1947, Premium Pay Provisions in Union Agreements, p. 424.

in Appendix D (p. 32) attached to this brief. In these articles, it is also clear that the public understood the "straight ting" contract rates to be regular rates, for the term "regular rate" is generally used.

From the earliest longshore union contracts to 1934 on the Pacific Coast and to the present on the Gulf Coast, the contracts between the unions and employers have followed the pattern of wages and hours prevailing in the New York harbor; that is to say, work was carried on on the basis of a stated clock hour day with straight time rates applicable to such hours and overtime rates, approximately 50 per cent higher, applicable to all other hours. Such other hours have always been designated as "overtime" in the Pacific and Gulf Coast agreements. Thus the contract of the Riggers and Stevedores Union applicable in San Francisco in 1911 provides:

- "1. Nine hours' work performed between the hours of 7 A.M. and 5 P.M. shall constitute a day's work.
- "2. All work performed between the hours of 5 P.M. and 7 A.M., on Sundays, or on State and National Holidays, shall be considered overtime."

The same wording with minor variations continued to be used in each contract until 1934.13

At the conclusion of a maritime strike on the Pacific Coast in 1934, all disputes of the longshoremen and their employers were submitted to arbitration before the

¹³ The contracts in New Orleans and Gulf ports always used the term "overtime" following the award of the National Adjustment Commission for New Orleans, dated November 2, 1918, which provided:

[&]quot;First: The basic working day of eight (8) hours from 7 A.M. to 12 o'clock noon, and from 1 P.M. to 4 P.M. is hereby established.

[&]quot;Second: On general cargo men shall receive sixty-five cents (65c) an hour for regular time on all week days and all other time shall be counted, and paid for as overtime at the rate of one-dollar (\$1.00) per hour." (Emphasis supplied)

National Longshoremen's Board appointed by the President of the United States to hear and determine the strike issues. That Board rendered its award on October 11, 1934, and among other things ordered the parties to adopt a workday and workweek as follows:

Section 2. Six hours shall constitute a day's work. Thirty hours shall constitute a week's work, averaged over a period of four weeks. The first six hours worked between the hours of 8 A.M. and 5 P.M. shall be designated as straight time. All work in excess of six hours between the hours of 8 A.M. and 5 P.M., and all work during meal time and between 5 P.M. and 8 A.M. on week days and from 5 P.M. on Saturday to 8 A.M. on Monday, and all work on legal holidays, shall be designated as overtime.

In the hearings before the National Longshoremen's Board representatives of the International Longshoremen's Association, then representing the workers, clearly admitted the punitive character and purpose of overtime in the stevedoring industry as did Mr Ryan, President of the International Longshoremen's Association, when testifying in these cases (R. 173, 180, 186). The International Longshoremen's Association further urged the adoption of the six-hour day and thirty hour week, in exactly the form adopted by the Board, for the avowed and specific purpose of spreading the available employment among the workers, alleged to be excessive in number. At the same time a wage increase was granted by the Board to assure adequate earnings by reason of the reduction in the workday and workweek.

Despite contrary assurances by the International Longshoremen's Association and the increased rate intended to compensate for the shorter six-hour day, immediately following the award the longshoremen refused to be displaced by fresh men at 3 P.M., or at the conclusion of six hours

¹⁴ Relevant excerpts from the testimony are reproduced in Appendix E (p. 35).

straight time work, if there was further work to be done. Thus the employers were compelled either to work only a six-hour day or to employ the men at overtime rates. Since all trucking and other services incidental to longshore work remained on an eight-hour day on the Pacific Coast, steamslep companies found it impracticable and uneconomical to limit their activities to the six-hour day. The employers being unable to secure reliefs at 3 P.M. to continue work at straight time rates, in 1937, following a second strike, finally acceded to the actuality and the provision was inserted in contracts thereafter: "but there shall be no relief of gangs before 5 P.M."

In 1938, the National Labor Relations Board certified the International Longshoremen's and Warehousemen's Union as collective bargaining representative for a unit comprising all employers of longshoremen on the Pacific Coast, except in a few minor ports on Puget Sound. The six-hour day and the provision above quoted have since that date been incorporated in all longshore and dock workers contracts on the Pacific Coast except where the eight-hour day prevails.¹⁵

Thus we find that in the stevedoring industry on the Pacific Coast the same conception of contract overtime prevailed until 1934 as that which existed in New York. Since then, the only departure from the pattern of hours and rates of pay prevailing in New York arose out of the award imposed by Presidential Board upon employers on the Pacific Coast, which being identical in purpose with that underlying the Fair Labor Standards Act, simply reduced the length of the workday, thus imposing upon the em-

¹⁵ A majority of the suits filed on the Pacific Coast involve walking bosses who, while not covered by a collective bargaining agreement, have always been paid for straight and overtime work strictly in accord with the longshore contract, except for an added differential, and accordingly have enjoyed the benefits of the six-hour day since 1934. The balance of the suits involve terminal workers employed under a contract with the International Longshoremen's and Warehousemen's Union which in all material respects is identical with the New York longshore contracts.

ployers a similar obligation respecting overtime as that which had theretofore prevailed but greater in amount.

And so on the Pacific Coast as on the Atlantic, and as in industry generally, we find all parties in interest imparting to contract rates payable for the basic workday and workweek the same meaning as "regular" rates referred to in the law and treating overtime rates as being in conformity with the requirements of Section 7(a).

It is notable that one of the important segments of organized labor in this industry has affirmed these meanings and purposes in this case and that the International Longshoremen's and Warehousemen's Union has never taken any official position to the contrary.

Finally, the District Judge found, based upon evidence which cannot be challenged as insufficient to support the Findings:

"The Collective Agreements, since the International Longshoremen's Association organized the longshoremen in the Port of New York in 1916, reflect the desire and purposes of the Union to decasualize employment, to concentrate employment during the basic eight-hour day and to avoid 'overtime', except when absolutely essential." (R. 610-611)

"The employment of the 50 percent premium for such overtime hours was designed to constitute a deterrent and not a prohibition. Such 50 percent premium in the longshore industry has proved to be effective as a deterrent and is responsible for the high degree of concentration of longshore work in the Port of New York to the basic working day." (R. 612) III. If the Intent of Congress is Doubtful, the Doubt Should Be Resolved in Favor of the Petitioners Since a Contrary Decision Would Threaten the Foundation of Collective Bargaining, Expose Industry to Ruinous Claims and Otherwise Create Serious Injustice and Inequity.

It is axiomatic that when the intent of Congress is in doubt the Courts will not imply an intention which is contrary to public policy and interest. Many years ago this Court stated in Wilson v. Rousseau, 4 Howard 646, 680:

"We cannot but think a court should hesitate before giving a construction to the clause so deeply harsh and unjust in its consequences, both as it respects the public and individual rights and interests, upon so narrow a foundation."

No contrary principle was applied in Jewel Ridge Coal Corp v. Local No. 6167, 325 U.S. 161, since the Court there found that the Congressional mandate was clear.

Yet the decision of the Circuit Court of Appeals would clearly have this result, as the District Court found:

"Whatever the answer to such a rhetorical question, it is clear that the application of either of plaintiffs' formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry.

"Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the regular rate intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live."

"If we are free to reject the contractual 'regular rate' in the case of longshoremen, there is no rational basis for not rejecting it in the three illustrations. The inevitable consequence of such a rule would be severely to restrict the scope of collective bargaining, to check the development of agreements more favorable to employees than the minimum standards established by F. L. S. A. and to retard the use of overtime even when national interest required it." (R. 586)

Time and again, in the Norris-LaGuardia Act (47 Stat. 70. 29 U. S. C. A. §§101 et seq.), in the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. \$\$161 et seq.), in the Labor-Management Relations Act, 1947 (supra), and the Portal-to-Portal Act of 1947 (supra), Congress has declared the national policy to be one of encouraging the collective bargaining process. This Court itself has recognized that as the policy of the Fair Labor Standards Act, (supra, p. 7) as the legislative history of that Act shows (supra, p. 8). Yet the effect of the decision below would render futile collective bargaining respecting wages and hours, the most important terms of the collective agreement, since the actual rates of pay would in a large measure be fixed by law instead of by contract. Again the decision of the Circuit Court of Appeals would defeat one of the principal objectives of organized labor; that of obtaining uniformity of wage rates for employees performing similar work under similar circumstances. And, by virtue of the penalties which they would face, employers would be deterred from acceding to the long existing objective of organized labor to impose severe penalties for the performance of work at undesirable hours.

The rule announced in the decision of the Circuit Court, if upheld by this Court, will present to the stevedoring industry and others in like circumstances, the immediate need of setting aside collective bargaining at ements and industry practices which have long been at effect and insisting on new formulae to bring wage and hour provisions within the rigid rule set forth therein. The wage penalties threatened would leave no alternative to employers. How workers and unions will respond cannot be certainly known. Obviously, the results will be disturbing to industry, labor

and production. Probably, industrial disputes, controversy and unrest vill be serious. And, the effect on commerce must certainly be such as to result in hardship and inconvenience to the public.

The coast longshore agreement for the Pacific (and other shoreside labor contracts), as well as those in the Port of New York, contain specific provision that in the event of a final decision holding the contracts before this Court in non-conformity with the law either party may forthwith cancel, thus recognizing that employers in this industry cannot carry on without drastic changes. Where contracts do not contain such a clause, the problem is only deferred at the expense of employers until contract expiration dates arrive, at which time the impact will fall on commerce and the public.

On the Pacific Coast it is clear that if the decision of the Court below is affirmed, employers must attempt to abolish the six-hour day. It is a matter of common knowledge that in the coal and clothing industries and in many others, workdays of eight hours or less and workweeks of forty hours or less have been established although more or less regularly overtime hours are worked. In such industries also employers will be forced to resist continuance of conditions more favorable to employees than the statute requires, which have been obtained by organized labor through the process of collective bargaining.

It is fair to predict also that if the decision of the Circuit Court of Appeals is sustained, all industries subject to collective bargaining agreements will face retroactive liability in a flood of suits comparable to those which arose under the same law prior to the Portal-to-Portal Act of 1947. One cannot predict the exact extent of the liabilities which industry would face in that event. But, in an industry such as stevedoring where labor costs constitute more than 80 percent of the total operating costs, it is evident that financial ruin would result.

Some notion of the extent of the liabilities involved is indicated by estimates submitted to the Congress indicating that the liability of the Army, Navy and Maritime Commission to reimburse contracting stevedores (for war service only), if the judgment of the court below is sustained, will approximate \$300,000,000.¹⁶

The decision of the Circuit Court of Appeals is particularly unjust in that employers, such as those in the stevedoring industry, would suffer liabilities solely because they have exceeded their legal obligations by adding thereto liability to pay a similar rate for work performed at night and on Saturdays, Sundays and holidays. And on the Pacific Coast the injustice would be even more oppressive since a greater liability would result solely because an award of a Presidential Board, for purposes identical with those of the statute, imposed upon employers a six-hour day instead of an eight and a thirty-hour week instead of forty.

In the Portal-to-Portal Act of 1947, Congress declared the practical policy against interpretations of the law in disregard of long established customs, practices and contracts creating unexpected liabilities, impairing the resources and even threatening the solvency of employers and conferring windfalls on employees in excess of their contract rights. That policy applies with at least equal force in the cases now before this Court and fully supports the conclusion reached by the District Court.

CONCLUSION.

For the foregoing reasons and other reasons set forth in the petitioners' brief the Waterfront Employers Association of the Pacific Coast respectfully urgs that the deci-

¹⁶ Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, November 17-25, 1947, verbatim transcript, Bureau of National Affairs, pp. 65, 146, 224.

sion of the Circuit Court of Appeals in this case be set aside and the decision of the District Court be reinstated.

Respectfully submitted,

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APPENDIX A.

Excerpts from Authorities Concerning the Establishment and Purposes of Overtime Requirements by Organized Labor.

Sidney and Beatrice Webb in Industrial Remocracy, written in 1897, pointed out that as early as 1836 the London Engineers after a successful strike secured a 60-hour week and "the penalizing of overtime by extra rates." (p. 340) In a later passage they stated that the agreement for the London building trades made in 1892 "with extra rates in tended to penalize overtime, is only one of the latest of a practically unbroken series of collective agreements." (p. 341.)

Professor George E. Barnett, one-time President of the American Economic Association, in his work concerning the Typographical Union, The Printers, published in 1909, stated: "The distinctive characteristic of regulations aimed at reducing the length of the working day... is the requirement... of a considerably higher rate for overtime than for 'time.'" (p. 157). "The aim of the union is to reduce the hours of work and not to get extra pay. Although it cannot abolish such work entirely, it aims to make overtime as undesirable to employers as trade conditions will permit." (p. 159).

Professor T. S. Adams and Helen L. Sumner, of the University of Wisconsin, said in their textbook, Labor Problems, published in 1905: "Overtime is systematically opposed. One or two unions forbid it, except in cases of emergency, but the usual preventive is found in demanding extrapay for overtime." (p. 260)

In What's What in the Labor Movement, compiled by Waldo R. Browne and published in 1921, we find (p. 363):

"Overtime. Time worked beyond the number of hours established by collective bargaining, by custom, or by law as comprising the normal day or week in a particular industry, occupation, or industrial plant or time worked on Sundas and holidays, is so called.

The increased rate of pay commonly demanded by organized employees for such extra working time is often known as 'punitive overtime,' the trade union theory being that it is usually unnecessary and always undesirable to have overtime, and that the increased rate of payment is a penalty against the employer and intended to act as a deterrent."

In Labor and Social Organization, written by Richard A. Lester and David A. McCabe, published in 1938:

The union method of 'enforcing' observance of the normal day upon employers is to set a higher hourly rate for hours beyond the normal than for the hours up to the normal number. The overtime rate is usually 'time and one half' (150 per cent of the normal rate), with double time' (double the normal rate) for the days or half days not included in the normal working week. These are known as 'punitive overtime rates,' They allow the employer to work fr men overtime in emergencies but impose a tax to insure that it is an emergency. This practice has led to the charge that in demanding a shorter workday the men are aiming not so much at a reduction in actual hours as at an increase in the daily wages. However, most unions frown upon men working overtime regularly while other members of the union are unemployed. (p. 72)"

Industry, published in 1930, says (p. 228): "Overtime regulation is of considerable importance in building-trades unions. Most of the organizations provide for overtime rates between one and one-half and two times the regular rate." Discussing the charge that the rates are excessive, (he points out (p. 229) that "the unions contend that the rate is intended to be punitive, to discourage overtime, to force an employer to do all the work during the regular eight hours." He adds: "An examination of union policy shows a fundamental purpose behind overtime wage regulations. The union is interested in equalizing the working opportunities of its members. . . . Punitive overtime rates

aim to spread production ever a longer period and to equalize the working opportunities among the union members.'s

Willard E. Hotchkiss and Henry R. Seager, in History of the Shipbuilding Labor Adjustment Board 1917-1919, stated:

"Compensation at higher rates for overtime is paid as a means of protecting workers against unduly long hours and of penalizing employers who require such hours." (pp. 38-39)

The views of labor leaders were summarized at the turn of the century by the Industrial Commission, which concluded:

"The general drift of opinion among American trade unionists is strongly in the direction of emphasizing the importance of a shorter work day. The most progressive leaders, such as Mr. Gompers, of the Federation of Labor, are constantly urging their associates to put the shorter work day in the forefront of their demands. Organize and control your trade and shorten your hours, is their position, and wages will take care of themselves..."

"Overtime work and work on Sundays and holidays are special cases of extension of the hours of labor. The position of the labor leaders logically requires that all work outside of regular hours be abolished. This is in fact the desire of all the more progressive union men, and the desire which is almost universally expressed in the collective action of the organizations."

"The stronger organizations usually secure a higher rate of pay for work outside of regular hours. The Building trades in particular get time and a half, and sometimes double time. The Lithographers and Core Makers have national rules requiring time and a half,

¹ Bulletin No. 283, Bur. of Labor Statistics.

² Reports of the Industrial Commission on Labor Organizations, Labor Disputes and Arbitration, U. S. Goy't. Printing Office, 1901, Vol. XVII, pp. XLVI-XLVII.

and similar rules are enforced by the local unions in many trades. A curious maintain of the feeling against owrtime is furnished by the Wood Workers. They insure their members against loss of tools by fire or accident, but they pay no loss which is incurred while the member is working on Sunday or after regular working hours."

A well-known labor attorney and student of labor policy, Elias Liberman, summarizes labor's objections to overtime as follows:

"Organized labor seeks to discourage overtime. It contends that overtime shortens the period of employment; it runs counter to the 'spread-the-work' principle; it aggravates the problem of unemployment; it endangers the health of the workers, it interferes with normal living. For these reasons labor insists that overtime be restricted and be paid at a higher rate than the regular hours. Because of these limitations, the employer will make use of overtime only in cases of absolute necessity."

F. T. Stockton, in his work on the Molders' Union, states that "the national officers have always tried to discourage overtime because it 'takes work away from the unemployed' and because tired men cannot do good work." (p. 167)

'Marion C. Cahill in Shorter Hours, Columbia University Press, 1932 states "Reduction of hours has been one of the two major demands of labor in the United States." (p. 11)

³ Ibid, pp. XLVII-XLVIII.

⁴ The Collective Labor Agreement, Harpers and Brothers, New York, 1939, p. 155.

⁵ The International Molders' Union.

APPENDIX B.

Full-Time Average Hours of Work Per Week Per Worker in Manufacturing.

- Year	Bureau of Labor Statistics	National Industrial Conference Board	
	· (d)	(e)	. (f)
1909	52.7		
1914	51.0	51.5	• • •
1919	47.8		
1920	47.1	48.2	
1921	45.2	45.6	4 00 0
1922	47.1	49.2	
1923	47.3	49.2	
1924	45.4	46.9	
1925	46.3	48.2	***
1926	46.5	48.1	
1927	46.3	47.7	
1928	46.1	47.9	
1929.	45.7	48.3	
1930	43.5.	43.9	
1931	41.7	40.4	
1932	38.2	34.8	
1933	37.8	36.4	38.1
1934	34.5	34.7	
1935	36.5	37.2	36.4
1936	39.1 •	39.5	
1937	38.6	38.7	37.2
1938	35.5	34.2	
1939	37.6	37.6	37.0
		TALL OF THE PARTY	

¹ Solomon Fabricant, Employment in Manufacturing, 1899-1939, National Bureau of Economic Research, New York, 1942, p. 234.

APPENDIX C.

Early Union Contracts Requiring Daily Overtime Before and After Specified Clock Hours.

As early as 1876, according to Stockton, the molders thought it necessary to support the ten-hour rule with a statement that the hours must be between 7 a.m. and 6 p.m. (pp. 161, 167).

The United Brotherhood of Leather Workers on Horse Goods at the turn of the century was concerned with establishing an 8-hour work day. Its views on limiting the work day were expressed by the following:

"The rules of the union forbid members to work more than 10 hours a day. The 10 hours are to be between 7 a.m. and 6 p.m. The Brotherhood has declared itself in favor of establishing an 8-hour day at the earliest possible moment..."

Another example of a prohibition of work at certain hours is found in the agreement between the Carpenters' Executive Council of Chicago and Vicinity and T. Nicholson and Sons Co. in 1899. "Eight (8) hours shall constitute a day's work between the hours of 8 a.m. and 5 p.m., except Saturday, when work shall cease at 12 o'clocknoon." 3

The constitution of the Lithographers' International Protective and Beneficial Association of the United States and Canada provided "that all work done outside of the hours of the agreed schedule is to be considered overtime and to be paid time and a half."

The agreement between the Master Steam and Hot Water Fitters' Association of New York City and the Enterprise Association of Steam, Hot Water, Sprinkler, Hydraulic,

¹ The International Molders Union.

² Report of the Industrial Commission on Labor Organizations, Labor Disputes and Arbitration, Vol. XVII, p. 308.

³ Ibid., p. 384.

⁴ Ibid., p. 115.

and General Pipe Fitters of New York City, made in 1900, provided:

"The working day shall consist of eight (8) hours between eight (8) o'clock a.m. and five (5) o'clock p.m. with one (1) hour for lunch, except on Saturday during the months of June, July, and August, when the time shall consist of four (4) hours between eight (8) o'clock a.m. and twelve (12) noon.

"The working day above named shall be known as regular time and shall be time actually employed at work.

"Rule No. 3

"Any work done between five (5) o'clock p.m. and eight (8) o'clock a.m., and on Sunday, New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Election Day, Thanksgiving Day, Christmas Day, and the Saturday half holiday shall be paid for at double the rate of regular time..."

A provision is included in the contract between the Hamilton County (Ohio) Carpenters' District Council and the Master Carpenters' Exchange, "That working hours shall be from eight (8) o'clock a.m. to twelve (12) o'clock m. and from one (1) o'clock p.m. to five (5) o'clock p.m.

A drastic provision against working outside of specified hours was embodied in the contract entered into on May 1, 1899, between the Amalgamated Sheet Metal Workers' Protective and Benevolent Association of New York and vicinity and the Employers' Association of Roofers and Sheet Metal Workers of Greater New York and Vicinity. "All work done between the hours of 5 o'clock p.m. and 8 o'clock a.m., and Sundays, New Year's Day, Lincoln's birthday, Washington's birthday, Decoration Day, Fourth of July,

⁵ Report of the Industrial Commission on the Relations and Conditions of Capital and Labor, U. S. Gov't Printing Office, 1901, Vol. VII, p. 941.

⁶ Report of the Industrial Commission on Labor Organizations, etc., Vol. XVII.

Labor Day, Election Day, Thanksgiving Day, Christmas Day, shall be paid at double rates of regular time." 7

The agreement entered into on April 1, 1899 between the Master Painters' Association of Troy, New York, and Vicinity, and local union No. 12, Brotherhood of Painters and Decorators of America, at Troy, New York, illustrates a similar attempt to penalize work at certain hours of the day. "Article 3" states: "That 8 or 9 hours shall constitute a day's work the same to be performed between 7 a.m. and 6 p.m., and that after 6 p.m. overtime must be paid."

A limitation upon the hours of the day that can be worked is also found in the agreement of the Concord Granite Manufacturers' Association and the Concord branch of the Granite Cutters' National Union, for the period ending May 1, 1902. "Eight hours shall constitute a day's work, to be worked between the hours of 7 a.m. and 4 p.m..."

The agreement expiring June 1, 1901, between the large breweries of St. Isouis and the Brewers' and Malters' Union No. 6 at St. Louis provides: "Nine (9) consecutive hours shall constitute a day's work. With the exception of loading beer, work shall not commence before seven o'clock in the morning and last not longer than till five o'clock p.m." 19

A contract for the year 1899 between the local lodge of electrical workers in Washington and the employers provides as follows:

"Rule 1. The hours of labor shall be eight hours per day, to be performed between the hours of 8 a.m. and 5 p.m. for five days per week, and from 8 a.m. to 12 noon on Saturdays. Rule 2. That all work done between 12 m. and 5 p.m. on Saturdays be paid for at double the rate of wages. Rule 3. Any labor performed before 8 a.m. or after 5 p.m. shall be paid for at double the regular rate of wages."

⁷ Ibid. Vol. XVII, p. 394.

⁸ Ibid, Vol. XVII, p. 398.

⁹ Ibid. Vol. XVII, p. 399.

¹⁰ Ibid. Vol. XVII, p. 410.

¹¹ Ibid. Vol. XVII, p. 415.

APPENDIX D.

Excerpts from Publications Showing the General Understanding at that time of the Character and Purpose of Regular and Overtime Rates in the Stevedoring Industry.

According to the New York Sun of October 1, 1918;

"The demands of the International Longshoremen's Association, which represents 35,000 men in the ports of New York, Boston, Norfolk, Newport News, Baltimore and Portland, are for an eight hour day at \$1.00 an hour and \$2.00 an hour for overtime and Sundays. They are now getting 50 cents an hour for a nine hour day, and 75 cents an hour for overtime and \$1.00 an hour for Sundays and holidays."

The parties were unable to reach an agreement in 1918 and the issues in dispute were submitted to the National Adjustment Commission, a government body appointed during World War I to settle disputes involving longshore workers. Discussing the demands of the longshoremen for the following year, Dr. B. M. Squires, Secretary of the National Adjustment Commission stated, "The demands were for a basic rate of \$1 on general cargo as against the existing rate of 65 cents an hour, and for an overtime rate of \$2 as against \$1 an hour under expiring agreements."

According to the New York Times of September 13, 1928,

"Yesterday the steamship committee offered to base a new contract on the old wage scale of 85 cents an hour for regular time and \$1.35 an hour for overtime."

The New York Herald-Tribune of September 16, 1930 reported:

"No increase was demanded in wages and the workers were content to ask for a renewal in the face of the none too prosperous condition of the industry. The sentiment was that with a forty-four hour working

¹ B. M. Squires, "Peace Along the Shore," Survey, Aug. 2, 1920.

week, the present 85 cents an hour and \$1.30 overtime pay was a good figure.".

and the Journal of Commerce, September 18, 1930:

"At this meeting it was agreed that the 1929 scale should be renewed for the year beginning October 1, with the exception of the revision of one clause. Under the agreement longshoremen receive 85 cents an hour regular time and \$1.30 an hour overtime."

Similar expressions occurred in the following years.

"The present wage scale became effective on October 1 last year after the steamship employees and the union representatives had wrangled for several weeks. The men finally agreed to reduce the overtime scale from \$1.30 to \$1.20 an hour, but they succeeded in having the straight hourly pay of 85 cents an hour continued."²

"The Steamship group first offered the men a 20 per cent cut to 68 cents an hour and 96 cents for overtime, but this was quickly rejected by the workers." 3

"The deepwater steamship companies comprising the New York Shipping Association yesterday voted to submit a new wage offer of 75 cents an hour and \$1.00 an hour for overtime."

"Later the companies were ready to pay the men 75 cents an hour and \$1.05 for overtime." 5

"The present agreement went into effect on October 1 last and expires at the end of this month. It calls for a forty-four hour week at the rate of 85 cents an hour straight time and \$1.20 an hour for overtime. Although Mr. Ryan was non-committal it was learned from other union sources that the I. L. A. will demand \$1 an hour, \$1.50 overtime and a thirty-hour week."

² New York Herald-Tribune, September 8, 1932.

³ Ibid. September 13, 1932.

⁴ Ibid. September 20, 1932.

⁵ Ibid. September 24, 1932.

New York Herald-Tribune, September 7, 1934.

"Mr. Ryan declined last night to announce details of the wages which men will demand, but in labor circles it was said that they would have a basis of \$1 an hour for a thirty-hour week and \$1.50 an hour overtime. The contract now in effect calls for 85 cents an hour for a forty-four hour week and \$1.20 for overtime."

said the men sought a thirty hour week to provide more employment for their fellow workers and a wage of \$1 an hour and \$1.50 for overtime."

"Demands for an increase of 5¢ an hour regular time and 15¢ an hour overtime and a forty-hour week are to be submitted to the New York Shipping Association Monday by the International Longshoremen's Association. These demands were formulated yesterday at a meeting of the wage scale committee at 164 Eleventh Street. The present scale is 95¢ an hour regular and \$1.35 an hour overtime for a forty-four hour week. The new scale will be \$1 an hour regular time and \$1.50 an hour overtime. The scale will apply to all workers from Portland, Me. to Hampton Roads."

"Earlier in the day the North Atlantic district delegates discussed their proposal to shipowners for a reduction in hours from forty-four to forty a week and an increase in wages from 95¢ to \$1 an hour, with overtime raised from \$1.35 to \$1.50 an hour." 10

"The Association last week drafted demands which included increases in the hourly wage from 95 cents to \$1, with \$1.35 to \$1.50 for overtime." 11

"The contract which is effective Oct. 1 for one year, provides for the continuance of the forty-four hour working week, the men to receive \$1 an hour for the regular week and \$1.50 for overtime work. They are paid 95 cents and \$1.35 an hour overtime under the agreement now in effect."

New York Herald-Tribune, September 8, 1934.

⁸ Journal of Commerce, September 29, 1934.

⁹ Journal of Commerce, September 11, 1936.

¹⁰ Journal of Commerce, September 18, 1936.

¹¹ New York Times, September 18, 1936.

¹² New York Times, September 19, 1936.

APPENDIX E.

Excerpts from Testimony of Union Representatives Before the National Longshoremen's Board in 1934 Urging Establishment of the Six-Hour Day.

At the hearing before the National Longshoremen's Board, Mr. Melnikow, representing the International Longshoremen's Association, testified:

"Q. [Mr. Cushing] What do you mean by your

thirty-hour average per week!

"A. [Mr. Melnikow] The issues as defined contain a proposal that the maximum hours of labor be limited to thirty hours per week averaged over a period of I believe it is four weeks."

"That is to say, a man might exceed thirty hours in one or two weeks, or in three weeks, but at the end of the fourth week his average would be thirty hours per week. In other words, you might well put it this way: a maximum limit of 120 hours contained in a four-week period. These 120 hours might under that ruling conceivably be put in one week, but we hope it will not be.

"Q. [Mr. McGrady] I suppose that means that in case of a rush and of something unusual occurring in a week, the men can work as long as necessary, providing that the end of the four weeks it will average

up.

"A. That is right. Wherever possible the man would like to see the shifts limited to a reasonable maximum, naturally. That is provided for, as it has been from time immentical, by overtime rates after the normal shift has been exceeded. They are not going to insist on any maximum shift per week. If it is necessary for the men because of a rush of work to work longer than 30 hours a week the men have no objection. They feel, though, that in the long run an equitable distribution should be worked out so that over a four-week period the 30-hour week should be the maximum. Let me put it this way: After a man

¹ Transcript of Proceedings before the National Longshoremen's Board, 1934, Vol. 8, pp. 398-399.

has worked 120 hours during a four-week period the men feel that he should be permitted to rest, and let another man work in his place, so as to distribute the work as evenly as possible."

"Q.2 [Mr. Cushing] Now, in order that I may understand your six-hour proposal, is it your idea that in this proposal there should be men available enough in the industry to replace any man after he shall have worked six hours?

"A. [Mr. Melnikow] Yes, I think that the I. L. A. is willing to do its utmost to give the employers the

number of men required at all times.

"Q. I am not referring to the ILA. I am referring to the question as to whether or not the six-hour rate and the overtime after six hours is designed to increase the wages or to prevent the working of men in excess of six hours."

"A. It is the desire of the I. L. A. to encourage the use of fresh men after men have put in six hours whenever and wherever possible. As I have stated, I believe the I. L. A. will undertake and is in a position to furnish the men to take the place of those who have worked the six hours.

- "Q. [Mr. Petersen] Is it not a fact that owing to the fact that there were too many men on the waterfront, and we speak specifically of San Francisco, as shown by the Employers' own figures who claim there are too many men, that the only way in which you could put a spread of work program in was through a limitation of the hours!
- "A. [Mr. Melnikow] I think that is almost mathematically true."
- Mr. J. Singer, also representing the International Longshoremen's Association, further testified at the hearings in Portland:
 - "Q.3 [Mr. McCulloch] On the question of the 6 hour day and the 30 hour week, I understood you to advocate

² Ibid., pp. 422-423.

³ Ibid., Vol. 15, pp. 22-23.

8 1

that in the interest of spreading employment as widely as possible?

"A. [Mr. Singer] That is it

"Q. Will you explain whe, at the same time, you advocate the payment of time and half for overtime? In other words, to the extent that overtime is engaged, is not the opportunity for spreading employment cut down !

"A. As far as the overtime is concerned, I always figure the reason that there is a penalty put on overtime is to keep away from the overtime proposition. That is why all trade labor movements have asked for a penalty on overtime, in order to keep the boss from requiring you to work overtime. As far as I am concerned, I would rather not work overtime."

"Q. Mr. McCulloch As I understand it, then, the employees have no real objection to the 8-hour day except that it does not spread the work far enough or among enough men?

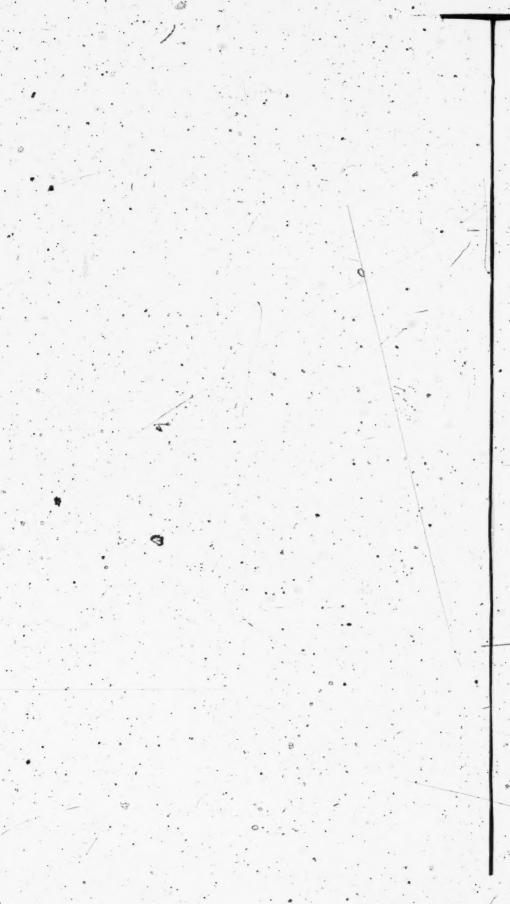
"A. [Mr. Singer] That is just the reason why we are asking for the 6-hour day. We are objecting to the · 8-hour day because there is not enough work to go

around.

"Q. That is what I understood and that is why you advocate the reduction from 8 hours to 6 hours?

"A. Surely. It is not to get the overtime."

Ibid., Vol. 15, p. 24.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 366-367.

No. 366.

BAY RIDGE OPERATING Co., INC., Petitioner.

JAMES AARON, ET AL., Respondents.

No. 367.

HURON STEVEDORING CORP., Petitioner.

LEO BLUE, ET AL., Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA.

By RAYMOND S. SMETHURST, Counsel;

L'AMBERT H. MILLER, HARVEY M. CROW, REUBEN S. HASLAM, Associate Counsel;

> Investment Building, Washington 5, D. C.



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IN THE

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Nos. 366-367.

No. 366.

BAY RIDGE OPERATING Co., INC., Petitioner,

V.

JAMES AARON, ET AL., Respondents.

No. 367.

HURON STEVEDORING CORP., Petitioner,

v

LEO BLUE, ET AL., Respondents.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as Counsel for the National Association of Manufacturers of the United States of America,

respectfully move this Honorable Court for leave to file the annexed brief amicus curiae in these cases.

- 1. The National Association of Manufacturers is a nonprofit membership corporation incorporated under the laws of the State of New York.
- 2. The membership of the Association consists of over 16,500 member companies engaged in manufacturing throughout the United States.
- 3. A large proportion of the Association's membership operates under union contracts collectively bargained with representatives of their employees.
- 4. Since most collective bargaining agreements contain some provisions for overtime payments for time worked outside the normal work schedule, the decision in this case will have a direct and important bearing on these agreements.
- 5. On or about December 17, 1947, Counsel for the Association wrote to the attorneys of record for the parties in these cases requesting consent to file a brief amicus in connection with this cause.
- 6. The Department of Justice by letter dated December 24, 1947, granted consent to the filing of a brief by the Association as amicus curiae.
- 7. The respondents, by their attorneys, Goldwater and Flynn, declined consent as follows on December 22, 1947:
 - "Yours is the fourth such request. We have declined consent in all cases, and do so likewise in yours, to avoid confusion of the issue before the Court with other matters not germane."
- 8. On December 27, 1947, typewritten copies of the Association's proposed brief were sent to the attorneys for the

parties and on December 31, 1947, the final brief was so mailed. The final brief differed from the typewritten copies previously sent only in minor respects.

9. Basically these cases involve the question of whether or not overtime paid for at time and one-half under a collectively bargained contract for time worked before or after established "normal" work periods is overtime which may be offset against that payable under the Fair Labor Standards Act. In other words, are such contract overtime payments inerely compensation for straight time which must be included in the "regular rate" of pay for purposes of computing overtime as required by the Fair Labor Standards Act?

Obviously, any decision reached will have an important bearing on the collective agreements and industrial relations of numerous members of the National Association of Manufacturers.

The potential retroactive liability can hardly be estimated for industry as a whole at the present time. Some indication of its magnitude can be gained, however, from the amounts involved in the stevedoring industry alone as developed in the record of these cases.

The impact of a decision upholding the Circuit Court upon industry generally is discussed in the attached amicus brief. It is our earnest belief that this brief will be of assistance to the Court in that it seeks to develop certain aspects of the problem not treated in detail in the briefs of the parties directly affected.

10. Although by reason of the foregoing circumstances, consent of all parties to the litigation has not been obtained as provided in Rule 27, subd. 9, of the Rules of this Court, it is respectfully submitted that the case affords an appropriate occasion for the exercise of this Court's discretion and undoubted power to receive the Association's amicus brief annexed hereto.

We, therefore, respectfully urge that the Court grant leave to file the annexed brief which is made a part of this motion, on behalf of the National Association of Manufacturers as amicus curiae.

Respectfully submitted,

RAYMOND S. SMETHURST, Counsel;

LAMBERT H. MILLER, HARVEY M. CROW, REUBEN S. HASLAM, Associate Counsel;

Investment Building, Washington 5, D. C.,

For the National Association of Manufacturers of the United States of America.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 366-367.

No. 366.

BAY RIDGE OPERATING Co., INC., Petitioner,

JAMES AARON, ET AL., Respondents.

No. 367.

HURON STEVEDORING CORP., Petitioner,

LEO BLUE, ET AL., Respondents.

BRIEF OF THE NATIONAL ASSOCIATION OF MAN-UFACTURERS AS AMICUS CURIAE.

JURISDICTION, STATUTE INVOLVED, AND FACTS.

The Court's attention is respectfully invited to the Government's brief in which the above are set forth in detail.

QUESTION.

The basic issue presented in these cases is whether contract overtime payments are "regular rate" payments under the Fair Labor Standards Act. Stated differently, the

¹ Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. 201, et seq.

issue is whether an employee who regularly works some overtime thereby creates a situation where the overtime becomes a part of his normal workday or workweek and therefore converts the overtime rate into a regular straight-time rate upon which overtime compensation must again be paid.

LOWER COURT DECISIONS.

The District Court² concluded that overtime paid under the contracts involved here could be credited against statutory overtime and that the character of overtime was unaffected by the regularity of an employee's work during overtime periods.

The Court below³ reversed that decision for reasons which are by no means clear. Apparently, however, the Court below based its decision on the following propositions of law:

- (1) That all time customarily spent by an employee at work must be considered to fall within his regular workday or workweek and treated as "regular rate" time even though some or all of the time worked was compensated for at contract overtime rates:
- (2) That the statutory "regular rate" of pay for an employee regularly working some contract overtime must be determined by dividing hours of work into compensation payable under the contract. (If all hours worked in a given week were during overtime hours, the contract overtime rate would be the statutory "regular rate".)
- (3) That the Belo case doctrine does not sanction the fixing of regular and overtime rates in the absence of a

² Addison, et al. v. Huron Stevedoring Corp.; Aaron et al. v. Bay Ridge Operating Company (1947, S. D. N. Y.), 69 F. Supp. 956,

³ Aaron et al. v. Bay Ridge Operating Company; Blue et al. v. Huron Stevedoring Corp. (C. C. A. 2, 1947), 162 F. (2d) 665.

⁴ Walling v. A. H. Belo Corporation (1942), 316 U. S. 624, 86 L. ed. 1716, 62 S. Ct. 1223.

guaranteed minimum weekly wage. (A contract fixing of a "regular rate" which may be less than the average rate in certain weeks is not permitted by the Act unless the contract also guarantees a weekly minimum wage).

IMPLICATIONS OF DECISION TO INDUSTRY GENERALLY.

If, as the Court below concluded, true overtime becomes regular time when customarily worked, many employers have unknowingly violated the law and have accrued huge retroactive liabilities. This novel principle of law could bring about litigation on a scale which might well exceed that which followed the decision of this Court in Anderson v. Mt. Clemens Pottery Co., (1946) 328 U. S. 680, 90 L. ed. 1515, 66 S. Ct. 1187. It would nullify a large number of existing collective agreements, seriously disrupt the practice and procedures of collective bargaining, and give rise to needless labor disputes.

The type of agreement involved in these cases is not limited to the stevedoring industry. Nor is this type of agreement the only type which would be jeopardized if the decision below should be affirmed. Overtime provisions of collective bargaining agreements vary widely as indicated by a recent study of the United States Department of Labor.⁵

"More than four-fifths of all workers in the sample received premium pay for . . . work on holidays". (Monthly Labor Review, October 1947, p. 419.)

Study of Bureau of Labor Statistics entitled "Premium Pay Provisions in Selected Union Agreements", Monthly Labor Review, October 1947, Vol. 65 No. 4, pp. 419-425.

[&]quot;Most union agreements in effect in the second half of 1946—85 percent of those studied—provided overtime pay at the rate of time and a half for all work in excess of 8 hours a day or 40 hours a week...

[&]quot;Almost half the agreements...had provisions requiring penalty rates for work performed on Saturday as such; and about 60 percent covering a similar proportion of workers, required penalty rates for Sunday work as such.... more than 80 percent of the workers who received premium pay for Saturday or Sunday as such were paid time and half for Saturday work and double time for Sunday work.

There are outlined below three types of overtime provision found in an overwhelming majority of existing col-

lective bargaining agreements.

Work schedules and work patterns of employees differ between individuals, plants and industries. Schedules even for a majority of workers in a given plant or other place of employment vary with demands for the products or services of the business. It is not at all unusual in industry for plants to be operated around-the-clock, and for at least some employees to work regularly 48 hours each week or to work regularly on weekends and holidays. In fact there are many industries in which continuous round-the-clock operations are essential and in which overtime is of necessity scheduled with some regularity. Also, during the period from February 9, 1943, until August 30, 1945, most employees worked at least 48 hours per week in conformity with Executive Order 9301, "Establishing a Minimum Wartime Workweek of Forty-Eight Hours".

(1) Daily Overtime Paid Under Agreement.

An overtime clause found by the Department of Labor study to be in 85% of collective agreements requires the payment of overtime at time and one-half an employee's basic or regular rate for time worked in excess of 8 hours daily or forty hours weekly, whichever is greater. (These provisions were generally designed to conform to the overtime requirements of the Walsh-Healey Public Contracts Acts as interpreted by the Administrator and the Fair Labor Standards Act).

If an employee works on a schedule calling for daily shifts longer than 8 hours, it is the usual practice in industry to compute his overtime on a daily basis. The reason for this procedure may be simply stated. If an em-

⁶ Executive Order 9301, February 9, 1943, 8 F. R. 1825, Revoked by Executive Order 9607, August 30, 1945, 10 F. R. 11191.

⁷ Footnote 5, supra.

⁸ Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. 35-45.

ployee works on a schedule calling for 5 days of 10 hours each, he would be entitled under an 8 and 40 hour contract to 8 hours of overtime compensation if he worked only 4 days in a week. If he worked all of the scheduled hours, he would be entitled to 10 hours of daily overtime or 10 hours of weekly overtime, and payment of overtime on a daily basis would satisfy the requirements of the contract.

The serious implications of the rule of law enunciated by the Court below may be illustrated by applying it to an employee working on a schedule of 10 hours daily and 50 hours weekly and who has been paid in conformity with an 8 and 40 hour collective agreement.

If the regular or basic rate of the employee is \$1.00 per hour, he would have been paid for his normal week of 50 hours the sum of \$55—40 hours at \$1.00 and 10 hours at \$1.50.

Under the rule of the Court below, the \$55 paid under the contract would presumably be treated as straight-time compensation. If so, the "regular rate" for purposes of the Fair Labor Standards Act would have to be computed by dividing 50 hours into \$55. The resultant fictitious "regular rate" is \$1.10. Accordingly, the employee would be entitled to be paid \$60.50 under the Act for the workweek instead of \$55 paid under the contract. This figure, when considered in conjunction with the double penalty provisions of section 16(b) of the Act, should point up the serious potential liabilities here involved."

(2) Weekly Overtime Paid Under Agreement.

If an employee has normally worked on a 48-hour weekly schedule, consisting of six 8-hour days, the result would be comparable. If his straight-time rate was \$1.00 per hour, he would have been paid under a typical collective agreement \$52—40 hours at \$1.00 and 8 hours at \$1.50.

Applying the decision of the Court below, his "regular rate" for purposes of the Act would appear to be \$1.08

⁹ 29 U. S. C. 216(b), 52 Stat. 1069.

per hour. Thus, he should have been paid \$56.16 for each full week instead of \$52.00.

(3) Overtime Paid for Safurdays, Sundays and Holidays.

If an employee has a normal workweek of six 8-hour days, including Saturdays and specified holidays for which time and one-half is payable under the usual collective agreement, and Sundays, for which double time is payable, his regular rate, again applying the decision below, would presumably be determined by dividing 48 into his straight-time and overtime payments due under the Contract. An employee whose contract rate was \$1.00 an hour would have a new regular rate of \$1.33 during a week having one holiday, and a regular rate of \$1.25 during a non-holiday week.

On the basis of these three examples alone, it is respectfully submitted that the District Court did not overstate the probable impact of the rule of law sought to be established by the respondents herein when it said

"... it is clear that the application of ... plaintiffs' formulae to the Nation's wage bill retrospectively would create havor with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry.

"Such eatastrophic results are inevitable once we accept plaintiffs' underlying pemise—that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot exist."

It is respectfully submitted that the decision of the Court below is not required by the Fair Labor Standards Act, nor by decisions of this Court. Moreover, it is contrary to the intent of Congress as most recently expressed in the Labor-

TOTAL PARTY

^{10 60} F. Supp. 956.

Management Relations Act, 1947¹¹ and the Portal-to-Portal Act of 1947.¹²

ANALYSIS OF DECISION BELOW.

The primary ruling of the Court below was that work defined by contract as "overtime" must be treated as "regular" time when customarily or normally worked.

A careful review of the Circuit Court's decision indicates that its ruling was based on one general interpretation by the Administrator of the Act, a more specific interpretation by an Assistant Solicitor of the Department of Labor, and upon certain decisions of this Court, which the Court below believed controlling.

The administrative interpretations relied upon suggest that overtime compensation paid for hours not normally worked may be credited against statutory overtime, but that overtime compensation paid for hours normally worked may not be so credited. It is submitted that other administrative interpretations not cited by the Court below support the conclusion that any true premium overtime compensation may be properly credited against statutory overtime.¹³

It is not our purpose here to dwell at length on the administrative interpretations treating the subject of crediting overtime payments against statutory overtime. We are convinced that the Court below attached an importance to the phrase "hours worked outside the normal or regular working hours" not warranted by the context of the entire interpretative bulletin or by administrative enforcement policies. We have been unable to find any case in which the Administrator has initiated formal proceedings to establish that contracts of the type involved herein or that other types of agreements of the character described above violate the Act when evertime work is regularly scheduled.

If the Administrator gave to this language the same broad effect as was given by the Court below, it seems likely that

¹¹ Public Law 101, 80th Cong. 1st Sess.

¹² Public Law 49, 80th Cong. 1st Sess.

is Interpretative Bulletin No. 4, paragraphs 70(1), 70(2), 70(3), and 70(5), 1944 WH Man. 168-169.

the administrative interpretations would have incorporated standards or criteria for determining when and under what conditions time worked is either inside or "outside the normal or regular working hours."

But neither the administrative interpretations nor the decision of the Court below contain any guides for determin-

ing what are "normal or regular working hours."

For example, are the "normal" hours of an employee to be determined from his individual work schedule or by the schedule prevailing in his place of employment or generally in the community or industry? Again, how frequently could an individual work during overtime periods before such overtime would be considered as part of his "normal" hours?

The second proposition of law advanced by the Court below, is that an averaging theory must be followed in all cases concerned with the meaning of the term "regular rate" unless the factual situations are substantially the same as those existing in Walling v. A. H. Belo Corp. (1942), 316 U. S. 624, 86 L. ed. 1716, 62 S. Ct. 1223, and Walling v. Halliburton Oil Well Cementing Co. (1947), 331 U. S. 17.

We believe the Court below erred in this conclusion by misconstruing the scope and application of the various "regular rate" decisions of this Court.

This Court first enunciated the "averaging? doctrine in the case of Overnight Motor Transportation Co. v. Missel (1942), 316 U. S. 572, 86 L. ed. 1682, 62 S. Ct. 1216.

This case presented two problems. (1) Whether or not the Act compelled the payment of additional compensation for overtime to a weekly rate employee whose salary exceeded the statutory minimum for hours worked up to 40 each week and time and one-half that minimum for hours worked in excess of 40; and (2) what constituted the employee's "regular rate."

Concerning the first, this Court said:

"We conclude that the Act was designed to require payment for overtime at time and a half the regular

pay, where the pay is above the minimum, as well as where the regular pay is at the minimum."

The "regular rate" of the employee was directed to be determined as follows:

"Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours."

No other questions were involved in this case. It cannot be properly concluded, therefore, that the Missel decision

compels the Circuit Court ruling.

The decision of this Court in Walling v. Helmerich & Payne, (1944), 323 U. S. 37, 89 L. ed. 1, 65 S. Ct. 11, was also cited by the Court below as supporting its conclusion. In this case the Missel or "averaging" doctrine was found applicable for determining the "regular rate" of employees paid in conformity with a so-called "Poxon" or splitday plan. This plan provided that the first half of each tour of duty was to be paid for on a straight-time rate, and the second-half on an overtime rate. This Court concluded that under the plan, the workweek of employees was "shorn of all significance," It then held that the plan did not "allow extra compensation to be paid for true overtime hours."

We have no quarrel with the Helmerich & Payne decision. The facts in that case, however, must be distinguished from the facts in the cases now before the Court. The so-called Poxon plan was not the result of collective bargaining and did not purport to establish bona fide straight-time or overtime rates.

Under the most usual type collective agreement providing for overtime payments for work in excess of 8 hours daily and 40 hours weekly, it is frequently necessary for some or all employees to work a fixed number of overtime hours during many weeks of a year. When they so work, it

¹⁴ 316 U. S. 572 at p. 580, 86 L. ed. 1682, 62 S. Ct. 1216.

¹⁵ Idem at page 578.

should not be concluded that they are engaged under conditions in anyway similar to those found to exist in the Helmerich & Payne case. Nevertheless, under the ruling of the Court below, employees engaged in conformity with such an agreement and normally working some overtime must be treated in the same manner as employees engaged under a split-day plan.

The averaging doctrine was also applied by this Court in the cases of 149 Madison Avenue Corp. v. Asselta (1947), 329 U. S. 764, 91 L. ed. 1062 (adv. op.); U. S. v. Rosenwaster (1945), 323 U. S. 360, 89 L. ed. 301, 65 S. Ct. 295; Walling v. Harnischfeger Corp. (1945), 325 U. S. 427, 86 L. ed. 1, 65 S. Ct. 11; and Walling v. Youngerman-Reynolds Harliwood Co., Inc., 325 U. S. 420, 89 L. ed. 1705, 65 S. Ct. 1242.

Again, the facts in each case are distinguishable from those in the instant cases, and from the facts frequently present when employees work under collective agreements fixing their wages, hours and working conditions.

In the Asselfa case, the normal weekly hours of regular employees were established at 54 and 46 by the contract. Their weekly wages were said to include payments for regular hours and time and one-half for hours in excess of 40. Their hourly rate was to be derived from weekly wages by applying a specific formula.

This Court found that the formula was not followed and applied in determining the amount of wages due employees. Therefore, it concluded that the contract failed to conform with requirements of the statute.

In Walling v. Youngerman-Reynolds Hardwood Co., Inc., supra, this Court was confronted with the problem of determining the "regular rate" of employees paid on a piece rate basis with minimum hourly guarantees. The problems involved in U. S. v. Rosenwasser, supra, were whether the Act applied to piecework employees and if so, how is the "regular rate" determined.

In each case, the Missel doctrine was applied. But neither case involved any question such as those now before the Court.

In Walling v. Harnischfeger Corp., supra, the only question directly before the Court was whether the "regular rate" of employees had to include incentive bonuses earned and paid for group efficiency. Clearly, this question did not relate to the question now before the Court and the decision on bonuses does not settle the overtime issue involved herein.

In summation, all of the decisions cited by the Court below to support its averaging doctrine must be distinguished from the cases now before this Court. Not one of the cited decisions compels the conclusion of the Court below.

The last proposition seemingly adopted by the Circuit Court is that any collective agreement would violate the Act if it purported to define regular and overtime rates for employees who normally and regularly work some overtime. Stated broadly, this conclusion means in reality that collective bargaining contracts are incapable of defining regular and overtime rates which will satisfy the requirements of the Fair Labor Standards Act.

This conclusion, we respectfully submit, disregards various decisions of this Court making it clear that as a matter of law employer and employee may fix a "regular rate" and of course, an overtime rate] by contract. See Walling v. A. H. Belo Corp., supra, Walling v. Halliburton Oil Well Cementing Co., supra. See also Walling v. Youngerman-Reynolds Harwood Corp., supra, wherein this Court said:

"As long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire."

And Walling v. Harnischfeger Corp., supra, wherein it is stated:

"... To discover that rate, as in the Youngerman-Reynolds case, we look not to the contract nomenclature

¹⁶ 325 U. S. 419 at p. 424, 89 L. ed. 1705, 65 S. Ct. 1242.

but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek." ¹⁷

CONGRESSIONAL INTENT SHOULD CONTROL.

In the past this and other courts have been faced with the need for reconciling two basic Federal statutes regulating employment relations: the National Labor Relations Act (49 Stat. 449, 29 U.S.C. Sec. 151 et seq.) and the Fair Labor Standards Act, supra. On occasion administrative and judicial interpretations of the F.L.S.A. have resulted in setting aside collectively bargained agreements fixing terms and conditions of employment more beneficial to employees than those required by the Act. See for example, Jewili Ridge Coal Corp. v. Local No. 6167, U.M.W., (1945) 325 U.S. 161, 89 L. ed. 1534, 65 S. Ct. 1063; Walling v. Harnishfeger Corp., supra; 149 Madison Ave. Corp. v. Asselta, (1947), supra; Walling v. Wall Wire Products Co., C.C.A. 6, (1947) 161 F. (2nd) 470.

Many of these decisions have been criticized even within this Court as unnecessarily restricting the proper area of collective bargaining and frustrating the policy of numerous Federal statutes; a policy, developed through a series of Acts dating at least as far back as 1926, designed to encourage and even require the practice of collective bargaining. 19

¹⁷ 325 U. S. 427 at p. 430, 89 L. ed. 1711, 65 S. Ct. 1246.

¹⁸ Railway Labor Act (44 Stat. 577, 45 U. S. C. 151 et seq.); Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 102 et seq.); National Industrial Recovery Act (Sec. 7(a) 48 Stat. 198), held unconstitutional in Schechter v. U. S. (1935), 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837.

¹⁹ See dissenting-opinion by Mr. Justice Jackson, the Chief Justice, Mr. Justice Roberts and Mr. Justice Frankfurter concurring, in Jewell Ridge Coal Corp. v. Local No. 6167, U. M. W. (1945), 325 U. S. 161, 172 wherein it was said:

[&]quot;We have repeatedly and consistently held that collectively bargained agreements must be honored, even to the extent that

It is respectfully submitted that today there can be no doubt as to the policy Congress intends to be paramount. By the enactment of the Portal-to-Portal Act of 1947 (Public Law No. 49, 80 Cong., 1st Sess.) and the Labor-Management Relations Act, 1947 (Public Law No. 101, 80 Cong., 1st Sess.) the Congress has made it abundantly clear that full faith and credit be extended to customs and practices embodied in collectively bargained agreements.

It is recognized that the instant cases were initiated before passage of the Portal-to-Portal Act and that Act is not squarely in issue here at the present time. It is submitted, however, that the Court appropriately can and should take cognizance of the congressional policy enunciated in these statutes and, unless clearly inconsistent with the ends of justice, seek to effectuate the basic principles therein set forth.

As this Court said in U. S. v. Hutcheson, (1941), 312 U. S. 219, 235, 85 L. ed. 788, 61 S. Ct. 463, speaking through Mr. Justice Frankfürter:

"On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 391, 83 L. ed. 784, 789, 59 S. Ct. 516, and authorities there cited."

And in the same case quoting with approval the language of Mr. Justice Holmes, on circuit, in *Johnson* v. *United States* (C.C.A. 1st) 163 F. 30, 32, 18 L.R.A. (N.S.) 1194:

employers may not, while they exist, negotiate with an individual employee or a minority, cf. J. I. Case Co. v. National Labor Relations Bd., 321 U. S. 332, 88 L. ed. 762, 64 S. Ct. 576, and must pay heavy penalties for violating them. Cf. Order of R. Telegraphers v. Railway Exp. Agency, 321 U. S. 342, 88 L. ed. 788, 64 S. Ct. 582. And now at the first demand of employees the Court throws these agreements overboard, even intimating that to observe agreements, bargained long before enactment of the Fair Labor Standards Act would be 'legalizing' a frustration of the statutory scheme.'

"A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." (Emphasis supplied).

The Congress in enacting the Labor-Management Relations Act, 1947, restated in identical terms the policy of the United States as expressed in the N.L.R.A. (Sec. 1) of seeking to eliminate obstructions to interstate commerce ... by encouraging the practice and procedure of collective bargaining ... for the purpose of negotiating the terms and conditions of their [employees] employment

Section 1 of the Portal-to-Portal Act sets forth clearly and in detail the basic reasons underlying enactment of this statute. Therein the Congress has made a finding "that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees..." thus, creating large, unexpected liabilities retreactive in operation against employers with the result that if permitted to stand, claims arising under such interpretations would bring about "financial ruin of many employers" and impair the capital resources of many others.

The Congress further found that under then existing conditions "the credit of many employers would be seriously impaired"; that employees would receive "windfall" payments, including liquidated damages for activities performed without any expectation of reward beyond agreed upon "regular rates" of pay; that demands for such windfall payments would be stimulated and that "voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created."

The Congress recognized that such claims would create a serious burden on the Courts of the country and that "champertous practices would be encouraged." In addition the serious effect on our public finances through loss of tax revenues and increased costs of goods purchased were viewed as contributing to the need for this legislation.

It was therefore declared to be the policy of the Congress (Sec. 1(b)) in enacting this law to meet the existing emergency and "to correct existing evils", "(1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts." 20

Here then, is a congressional policy declared in unmistakable terms. Clearly the public policy expressed in the Portal-to-Portal Act was intended to apply to all cases arising under the Fair Labor Standards Act and not just to the so-called "portal type" cases.

It is not suggested that collective agreements can be permitted to do open violence to the policies of the F.L.S.A. This Court has, however, in at least two cases recognized, that the Act should not lightly override even individual employment contract arrangements where the minimum standards in the Act have been faithfully observed. Walling v. Belo Corp., supra, and Walling v. Halliburton Oil Well Cementing Co., supra. Certainly collectively bargained contracts are entitled to at least the same dignity and respect.

Further evidence of the Congress' intent to eliminate insofar as possible unjustified claims for back wages and liquidated damages is demonstrated in the 2-year statute of limitations provision on all such claims and granting the courts some discretion in fixing the amount of liquidated damages which may be recovered.

²⁶ The Portal Act seeks to ban all past so-called "portal" claims for minimum wages or overtime or liquidated damages not based on custom or practice. Much the same emphasis is placed upon "contract, custom or practice" with respect to future so-called "portal" claims. In addition a defense is provided against "portal" type claims as well as all other claims for retroactive wage payments where it can be shown that a "good faith" effort was made to comply with the law as interpreted.

The Record in these cases is abundantly clear and undisputed that the terms and conditions of employment were arrived at through good faith collective bargaining between the employers and representatives of their employees. (See testimony of Joseph B. Ryan, President, International Longshoreman's Association (R. 232 et seq.). The rates of pay and hours of work were all well within the standards prescribed by the F.L.S.A. and in fact far more liberal than such minimum requirements.

Based upon voluminous testimony and exhaustive findings of fact, United States District Judge Rifkind in his opinion below (69 F. Supp. 956) had this to say:

"The agreement here under scrutiny was not an artificial rearrangement of pre-F.L.S.A. rates of compensation in order to avoid additional compensation payable under that Act. It is not an attempt 'to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes' (citing cases).

"On the contrary it is the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation."

Even assuming the correctness of earlier decisions of this Court, the Congress has now, with knowledge of those decisions, declared that henceforth greater freedom and protection be accorded established customs, practices and contracts in the administration and enforcement of the Fair Labor Standards Act.

CONCLUSIONS.

- 1. Neither the Fair Labor Standards Act nor the Decisions of this Coart Warrant Affirmance of the Decision in this Case Filed by the Court Below.
- 2. The Congressional Policy as Expressed in the Labor-Management Relations Act, 1947 and the Portal-to-Portal Act of 1947 Affords Ample Justification for Reversal of the Decision Below and in Our Judgment Compels such a Result.

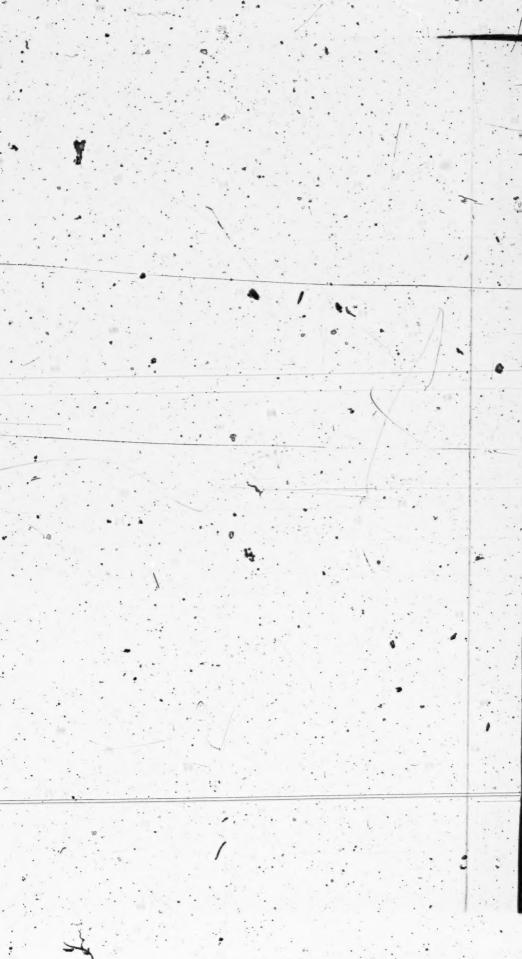
Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA.

By RAYMOND S. SMETHURS Counsel;

LAMBERT H. MILLER, HARVEY M. CROW, REUBEN S. HASLAM, Associate Counsel;

Investment Building, Washington 5, D. C.,



1948

" Sunreine Quark M. A.

COUNTY IL STORE DISPLET

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947 Nos. 366-367

BAY RIDGE OPERATING Co. INC.,

Petitioner,

Petitioner,

JAMES AABON, et al.

HUBON STEVEDORING CORP.,

LEO BLUE, et al.

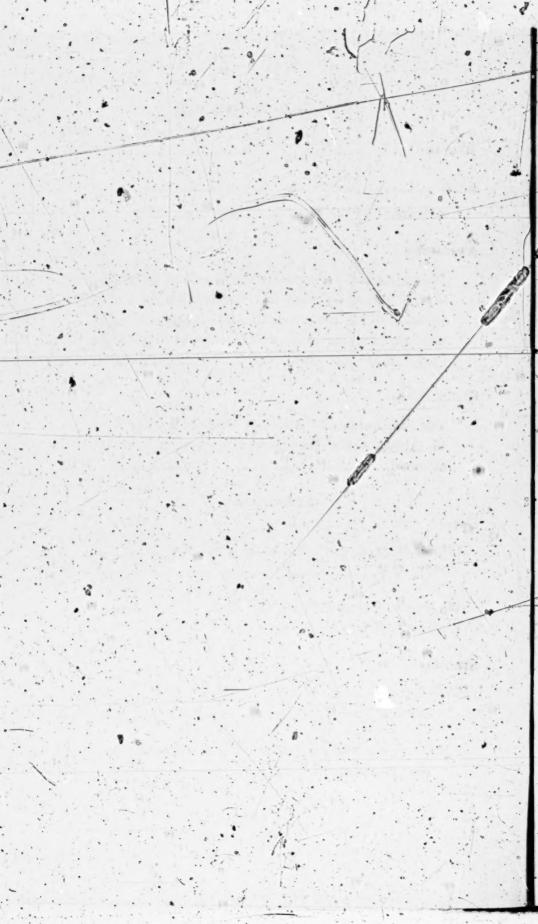
MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF FRANK ADAMS, AS AMICUS CURIAE

> NATHAN BAKER, Attorney for Frank Adams, et al., 77 River Street, Hoboken, N. J.



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Supreme Court of the Anited States

OCTOBER TERM, 1947 Nos. 366-367

BAY RIDGE OPERATING Co. INC.,

Petitioner.

-VB.-

JAMES AARON, et al.

HUBON STEVEDORING CORP.,

Petitioner.

LEO BLUE, et al.

Motion of Frank Adams for Leave to File Brief as Amicus Curiae

FRANK ADAMS respectfully prays leave to file a brief as amicus curiae in the above captioned cases. The applicant has in writing requested consent of counsel for petitioner and counsel for respondents.

Consent has not been received from either counsel.

Throughout this motion and briefs, the petitioner shall be referred to as defendants and respondents shall be referred to as plaintiffs.

The applicant is one of approximately 1500 longshoremen in the State of New Jersey who have joined together in several actions now pending in the United States District Court, Southern District of New York against defendants-appellants and other stevedoring companies involving the same questions of fact and law as are involved

in the above captioned cases. He makes this application for leave to file a brief as amicus curiae as he believes that the legal question to be decided by this court is of major importance to himself and his fellow longshoremen associated with him in the legal actions which they have filed and which are now pending and which will be affected by the decision of this court in the above captioned cases.

He believes that for the heavy physical labor performed by the longshoremen during the night time, Saturday afternoons and Sundays in excess of 40 hours per week they should be paid one and one half times the regular rate in accordance with the intention and requirements of the Fair Labor Standards Act, and that the employers violated the Act in failing to make said payment.

He believes that the legal question presented in these cases is of major importance to the nation, involving the construction of the Fair Labor Standards Act insofar as it applies to longshoremen in the various ports of the United States.

He believes it to be his public duty to bring before the court the reasons which impel his conclusion that the judgments below should be affirmed.

FRANK ADAMS therefore respectfully requests leave to file a brief as amicus curiae.

NATHAN BAKER,

Attorney for Frank Adams, et al.
77 River Street,
Hoboken, N. J.

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 366-367

BAY RIDGE OPERATING Co. INC.,

Petitioner,

Petitioner.

JAMES AABON, et al.

HUBON STEVEDORING CORP.,

LEO BLUE, et al.

BRIEF OF FRANK ADAMS AS AMICUS CURIAE

Statement of the Case

The case is before this Court on a writ of certiorari granted by this Court to review judgments of the United States Circuit Court of Appeals for the Second Circuit, in actions brought pursuant to the Fair Labor Standards Act.

The plaintiffs are longshoremen who worked in the Port of New York. They contend, and their contention has been upheld by the Circuit Court, that they were not paid one and one half times the regular rate for work in excess of

forty hours in the work week; in violation of the Fair Labor Standards Act.

In pertinent part Section 7a of the Fair Labor Standards
Act is as follows:

"No employer shall " employ any of his employees
 for a workweek longer than forty hours
 unless such employee receives compensation for his
 employment in excess of the hours above specified at
 a rate not less than one and one half times the regular
 rate at which he is employed."

The plaintiffs are members of the Longshoremen's Union and the agreement between the Union and the defendant employers in pertinent part, is as follows:

- "a. Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M. Monday to Friday, inclusive, and from 8 A. M. to 12 Noon Saturday."
- "b. All other time including meal hours specified herein; shall be considered overtime and shall be paid for at the overtime rates."

It then specified that for general cargo, the straight time rate was \$1.25 per hour, and the overtime rate was \$1.875 per hour.

Work performed in the time designated in paragraph "a" of the Union agreement is done during regular and convenient hours during the day time and Saturday mornings,

Work performed in the time designated in paragraph 'b' of the Union agreement is dangerous and inconvenient. It is dangerous because performed at night under artificial light which tends to tire the men quickly. It is

difficult because observation is seriously impeded by inability to illuminate the entire work area at all times. It is inconvenient because the traditional working hours are in the daytime and during week days; working on Saturday afternoons, Sundays and at night obviously sets a man apart from his fellow workers in other industries, and necessarily curtails his family relationship, his relaxation periods and all the normal activities of living. The work involves heavy, physical labor. A man literally earns his pay by the sweat of his brow.

The Union agreement therefore established two rates of pay: one rate of \$1.25 per hour for the regular and convenient hours by paragraph "a", and another rate of \$1.875 per hour for the inconvenient and dangerous hours by paragraph "b".

ARGUMENT

The rate paid to longshoremen for work done during the period specified as "overtime" in the Union agreement for inconvenient and dangerous hours was the "regular rate" within the purview of the Fair Labor Standards Act.

The entire case revolves itself, around the meaning of the word "overtime" in the Union agreement, and the meaning of "regular rate" in sec. 7a of the Fair Labor Standards Act.

From the debates in Congress, it appears that the rationale behind the Act with reference to hours was not to prohibit a workweek in excess of forty hours, but rather to put a penalty on an employer who worked his men in excess of forty hours per week by requiring him to pay his employee, one and one half times the regular rate for time worked in excess of forty hours.

In 83 Congressional Record, Part 8, p. 9177, col. 1, there is the following statement by Senator Walsh,

"Q. Does this mean that under no circumstances can any industry work its employees more than forty hours? A. No. Industries may work their employees more than forty hours. • • • but it must pay the employees for overtime at the rate of one and one half times the regular pay of its employees."

The Union agreement refers to pay for certain times as "straight time rate," for other times as "overtime rate". It is submitted that by calling gasoline water, gasoline is not thereby made into water. By calling work overtime, does not thereby make it overtime work within the meaning and intent of the Fair Labor Standards Act. What the Union agreement accomplished was merely to establish two rates of pay; one rate for regular and convenient hours, and another rate for inconvenient and dangerous hours. The term "overtime" as used in the agreement has no connection whatever with the number of hours worked, it is descriptive of the time of day not with the quantity of time. This is perfectly clear when one considers the fact that it is possible for a man to work more than fortyo hours per week in the "overtime" bracket without even working a single hour in the "straight time" bracket. And again a man may work one hour in the "straight time" bracket and receive \$1.25, and then on the same day he may work an hour in the "overtime" bracket and receive one and one half times as much-\$1.875. Patently, this is merely two rates of pay for work performed at diverse intervals of time; and no penalty is imposed for working a man over forty hours in a week. Both rates were the "regular rates" for work done during the respective periods specified.

The intent of Congress, as appears from the debates, is to place a penalty on employers who work their employees over 40 hours in the workweek by paying one and

one half times the "regular rate". Although many definitions of the word "regular" is to be found in the dictionary, the definition which most accords with its common, ordinary meaning and usage and as intended by Congress is as follows:

"constituted, selected, conducted, etc. in conformity with established usages, rules or discipline." (Webster's Dictionary.)

"The purpose and subject matter of a statute necessarily determine or control the meaning of the words used in it. * . But words of common usage should be given their usual, ordinary and natural meaning or signification, according to approved usage unless there is some indication contrary in the statute itself. The sense in which the words in question are used in every day life rather than their scientific meaning is the criterion to use in ascertaining the meaning. And it is to be presumed that the legislature has used the words in their known and ordinary signification. Similarly, where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted even though the ordinary meaning of the word is thereby enlarged or Testricted, and especially in order to avoid absurdity or to prevent injustice " " Crawford, Statutory Construction (1940), sec. 186, p. 315.

Also see

2 Sutherland, Statutory Construction (3rd ed. 1943), sec. 4919.

On many prior occasions, the Supreme Court of the United States has defined the terms "regular rate" in the Fair Labor Standards Act. Chief Justice Vinson in 149 Madison Ave. Corporation v. Asselta, 67 S. Ct. 1178, 1181 defines it thusly,

"The regular rate is thus an 'actual fact' and in testing the validity of a wage agreement the courts are required to look beyond that which the parties purported to do."

In the cases at bar, it is patent that the "actual fact" is that there was one rate of pay for certain designated intervals of time; and another rate of pay for other designated intervals of time. And hence, the Union agreement, although talking of "overtime", in reality made no provision for time worked in excess of forty hours per week,

In two earlier Supreme Court cases, the same thought was expressed.

In Walling v. Helmrich & Payne, Inc., 323 U. S. 37, 40, it was said,

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime work-week."

And again in Walling v. Harnischfeger, 325 U. S. 427, it appears,

"No contract designation of the base rate as the 'regular rate' can negative the fact that these employees do in fact regularly receive the higher rate."

Certainly, in the cases at bar, the men regularly received the higher rate designated in the Agreement as "overtime" when they worked in the times set forth in the "overtime" bracket. Merely calling these hours "overtime" do not make them hours in excess of forty hours within the purview of the Act.

Therefore, from lay, legislative, and judicial interpretation of the words "regular rate" it appears that the plaintiffs were not compensated for work performed in excess of forty hours in the work week, in compliance with the Fair Labor Standards Act. Rather there was a clever and subtle attempt to delude them into believing that they were receiving overtime for work performed in excess of forty hours in the work week by designating one rate of pay as straight time and another higher rate of pay as overtime. What they were really getting the higher rate for was not extra and additional compensation within the meaning of the Act, for work performed in excess of forty hours in the workweek, but for dangerous and inconvenient hours at designated times, irrespective of whether it was work performed less than or in excess of forty hours in workweek. This attempt by the employers of the longshoremen to subvert the will of Congress expressed by the Fair Labor Standards Act should not be sanctioned by this court.

It is respectfully submitted that the higher rate specified in section (b) of the Union Agreement for the work done during the periods specified as "overtime" was actually for inconvenient and dangerous hours and was the "regular rate" for that period, and for work in excess of 40 hours in the work week plaintiffs were entitled to one and one half times the "regular rate" pursuant to the Fair Labor Standards Act.

CONCLUSION

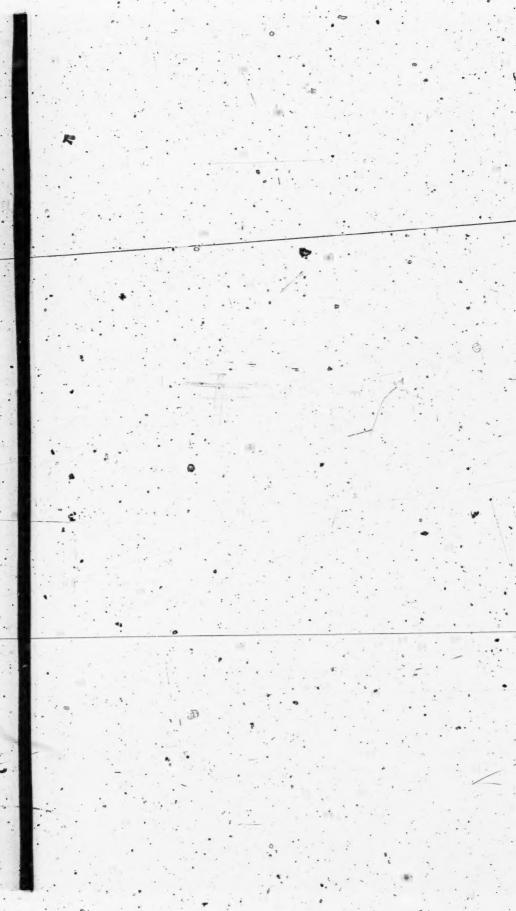
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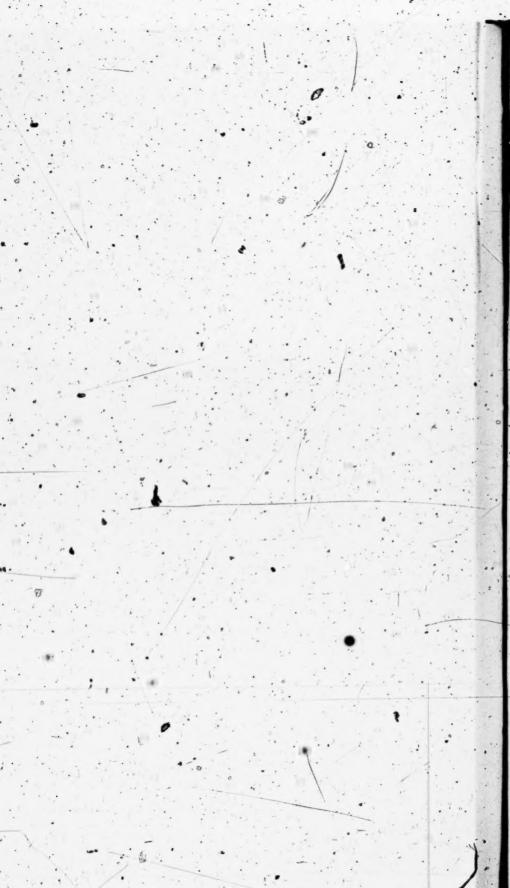
Respectfully submitted,

NATHAN BAKEB

On the Brief

NATHAN BAKEB BENJAMIN H. SIFF ALBERT MARGOLIN





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IN THE

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Supreme Court of the Unit

Остовия Тики, 1947

Nos. 366-367

BAY RIDGE OPERATING CO., INC., Petitioner.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

HUBON STEVEDORING CORP.,
Petitioner,

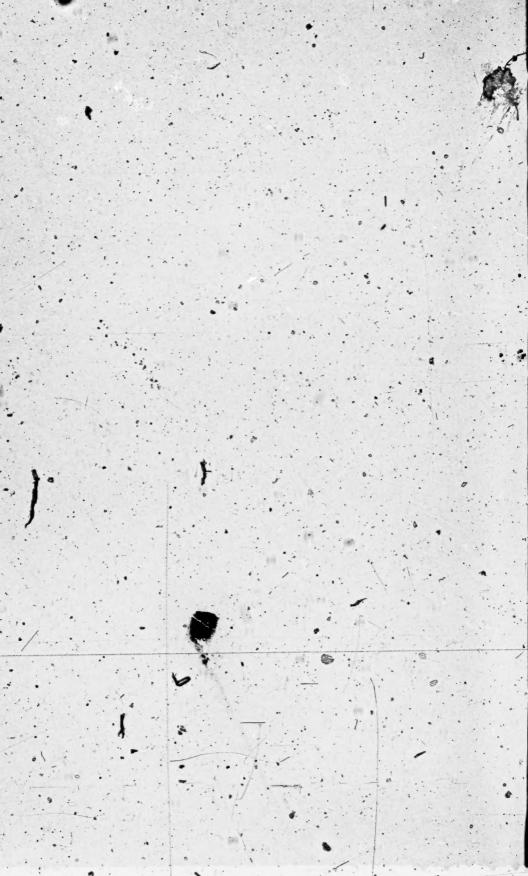
LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF IN SUPPORT THEREOF

INTERNATIONAL LONGSHOREMENS ASSOCIATION,
Amicus Curiae.

Louis Waldman, Counsel.



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and therefore not the regular rate

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING Co., INC., Petitioner,

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

No. 367

HURON STEVEDORING CORP., Petitioner.

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGee; Joseph Short, Alonzo E. Steele, and Whitfield Toppin.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS

Now comes the International Longshoremens Association (A.F.L.), by its attorney, and respectfully moves for leave to file the attached brief as Amicus Curiae in the above-entitled cause, in support of the petitioners' appeal from the decision of the United States Circuit Court of Appeals for the Second Circuit. As grounds for said motion, movant shows:

1. The International Longshoremens Association, hereinafter referred to as the I.L.A., an unincorporated association, is a labor union affiliated with the American Federation of Labor. It consists of some 500 locals in the ports of the United States and Canada, with a membership of approximately 80,000. Its membership in the Port of New York numbers approximately 30,000. The plaintiffs are longshoremen in the Port of New York and are members of the I.L.A. The I.L.A., through its affiliated locals, is the collective bargaining agency for its members. The I.L.A. has been negotiating and making collective bargaining agreements with employers governing the wages, and terms and conditions of employment of its members for more than 30 years. For this reason it has a vital interest in the subject matter of this case.

- 2: The petitioners, by the Solicitor General, have filed herein a petition that Writs of Certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, which reversed a judgment in favor of the defendants entered by the United States District Court for the Southern District of New York. This Just granted certiorari. The movant, the I.L.A., is desirous to support petitioners' appeal.
- 3. The Solicitor General, as counsel for the petitioners, has given his consent to the filing of this brief. Counsel for the plaintiffs-respondents herein, has refused his consent.
- 4. Special reasons in support of this motion are set out in the accompanying brief.

Respectfully submitted,

Louis Waldman, Counsel for

International Longshoremens Association,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING Co., INC., Petitioner,

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT:

No. 367

HURON STEVEDORING CORP.,

Petitioner.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGee, Joseph Short, Alonzo E. Steele, and Whitfield Toppin.

BRIEF

The Interest of the International Longshoremens Association

The International Longshoremens Association (A.F.L.), hereinafter referred to as the I.L.A., supports petitioners' appeal herein, because under the decision of the court

below, the economic and social gains it has made for its membership as a whole over a period of 25 years would be seriously undermined. Its capacity to negotiate and reach agreements in good faith for the betterment of the general conditions of its members, including the fixing of wage scales and overtime rates—which in this industry are over and above and superior to the standards set by the Fair Labor Standards Act—would be destroyed. Elements of uncertainty would be introduced into the processes of collective bargaining. The promises of the parties solemnly entered into and relied upon in working out an industrial code for the industry, would no longer have that moral authority and economic predictability which is a basic and essential requirement for effective pursuit of the processes of collective bargaining.

The rates of pay agreed upon between the union and the employers in the Port of New York, as evidenced in written contracts going as far back as 1916, demonstrate the evolution of an industrial relationship between a strong well-organized labor union on the one hand and a strong well-organized group of employers on the other. The union vigorously pursuing a course calculated to improve the standards and conditions of employment of its members, and the organized employers acting, in their own interest, through the New York Shipping Association, have, through the years, built an efficient and prosperous industry capable of yielding a reasonable profit to the owners, and those ever higher levels of wages and working conditions which the union has demanded and secured over the years.

The union simultaneously negotiates agreements with the employers in New York for 8 general classifications of employees, in the Port of New York. The wage scales and

overtime rates fixed in the collective agreements for the Port of New York are followed and adopted in the collective agreements for the many ports in the Atlantic Coast District of the union, which embraces every port north of Cape Hatteras along the Atlantic seacoast. In addition. they are followed in many of the ports throughout the country outside of the Atlantic Coast-District. The agreements negotiated in New York cover the following general classifications: General Cargo; Cargo Repairmen; Checkers: Clerking: Port Watchmen: General Maintenance Workers: General Mechanic and Miscellaneous Workers: Horse and Cattle Feeders, Grain Ceilers and Marine Carpenters. These 8 agreements take up 54 pages of small type in the booklet entitled "Agreements Negotiated by the New York Shipping Association with the International Longenoremens Association . . Effective October 1, 1943," which forms a part of Defendants' Exhibit A. The agreement which was considered in the above-entitled cases was the General Cargo Agreement.

The basic scale of wages under the 1943 General Cargo Agreement, ranged from \$1.25 per hour to \$2.50 per hour, the limit that was permitted under the "Little Steel Formula." These were the straight time hourly rates. The overtime hourly rates provided for in the agreement ranged from \$1.87% to \$3.75. The overtime hourly rates were fixed in this agreement, as indeed, in the collective agreements which preceded and followed it, at one and one-half times or 150 percent of the contract straight time hourly rate (except for negligible classifications where there was a very slight deviation upward or downward).

In 1916 the General Cargo Agreement provided for basic straight time hourly rates of \$.40 and overtime rates for night work of \$.60 per hour. The basic hourly rate for explosives was \$.80 per hour.

Wage scales are of course not the be all and end all of a collective bargaining agreement. Like most collective agreements negotiated by strong unions, the 1943 agreement also contains items dealing with the health, comfort and convenience of the workers, items dealing with human rights on the job as against the arbitrary powers of management, and items concerning machinery for arbitration. The 1943 General Cargo Agreement covers 15½ pages of small print in the booklet referred to supra.

It contains a provision for the preferential shop.

It fixes basic working hours and provides not merely for a maximum working week, but for a maximum basic working day in the following language:

"2. (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

from 12 Noon to 1 P.M., from 6 P.M. to 7 P.M., and from 12 midnight to 1 A.M.

"No work shall be performed during meal hours, except on arrival or sailing days, or to complete discharging or loading a hatch within the meal hour or by mutual agreement between the parties herete in the event of other emergencies."

It provides for legal holidays. It then sets forth that

"3. (a) Straight time rate shall be paid for any work performed from 8 A.M. to 12 Noon and from 1 P. M. to 5 P.M. Monday to Friday, inclusive, and from 8 A.M. to 12 Noon Saturday.

- the legal holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.
 - "(c) The full meal nour rate shall be paid if any part of the meal hour is worked and shall continue to apply until men are relieved."

The agreement then sets forth the wage scales for 8 types af cargo. For each of these 8 types, it provides a straight time hourly rate and an overtime hourly rate, which is 150 percent of the straight time hourly rate, except for the slight deviations already mentioned.

It will be observed, therefore, that the collective agreement provides for overtime pay, not merely for hours worked in excess of the basic working week, but for all time worked outside of certain specified daytime hours.

Provision is then made that the employer shall supply certain work necessities and for regular and convenient payment of wages.

"Shaping time", a mode of employment peculiar to the longshore industry, is regulated. In order to prevent, insofar as can be done, abuse of the "shape" as a form of hiring, the contract provides that under certain conditions a worker who is chosen at the "shape" must be paid a minimum of either 2 or 4 hours pay, as the case may be.

There is a provision for suitable shelter during bad weather.

Then follow almost two pages regulating the minimum number of men in gangs loading and discharging various types of cargo, with a provision for immediate ruling on any disputed cases that may arise under this clause. As a protection to the health of the workers, there are provisions concerning the maximum weights which may be lifted with and without the use of machinery. Similarly the agreement requires that the employer furnish clean drinking water and adequate sanitary facilities to the men; prohibits the use of intoxicants; and makes provision against shirking or pilfering.

There is a pledge that neither party to the agreement will discriminate against members of the other party.

Elaborate provision is made for arbitration of all disputes which may arise under the agreement.

The agreement here so briefly outlined, reflects the aspirations of the membership of the I.L.A. through the years. The increase in wages between 1916 and the date of this agreement, is paralleled by a reduction in working hours. The 1916 agreement provides for a ten hour day, while this agreement provides for an 8 hour day. The 1916 agreement covers 11/2 typewritten pages. This agreement covers 15 printed pages. Through the quarter of a century that passed between the writing of the 1916 and the 1943 agreements, the union was building up, through the collective agreements, a code of labor relations in the interest of its members. No separate part of that code stands by itself. No separate part of that code was negotiated and won by the union without reference to and relationship to the other parts. No part of that code so painfully built through the years, was granted by the employers without reference to and relation to the other parts. The developing character of the agreement through the years, its growing concern with matters in addition to wages, the extension of its protections over more and more aspects of the workers .

employment, reflects the processes of collective bargaining at their best.

In these agreements, over the years, the union fixed the basic and regular rates of pay, and the overtime rates, and they were understood to be the regular rates of pay and the overtime rates of pay by the parties to the agreements. Here was no overtime arrangement forced upon the union and the employers by the Act; the collective strength of the workers exercised through the I.L.A. and its predecessor organizations, had won overtime compensation for them long before the F.L.S.A.

Overtime was fixed at time and one-half the regular rates. No intricate computation to arrive at the overtime was necessary. The rates were clearly set forth, and no member of the union has ever expected overtime on overtime. No employer has ever expected that there would be a demand for it.

The union, speaking for its entire membership, cannot allow some of its members to repudiate individually an agreement as to what constitutes regular and overtime rates to which they, together with their fellow workers jointly agreed through the orderly processes of collective bargaining over a long period of years. For the union to stand by idly when such repudiation is attempted, would be to destroy the very foundation of bona fide collective bargaining.

The basic rates here involved are far higher than those required by the Fair Labor Standards Act. Without collective bargaining these very plaintiffs—members of the I.L.A. (Record, p. 25)— who now seek overtime on overtime rates ranging up to \$3.75 per hour during the period in suit might, like millions of other American workers,

still be working at the \$.40 per hour minimum provided by the Act.

The present agreement between the I.L.A. and the New York Shipping Association expires by its terms in August, 1948. One need not be a prophet to expect that the employers will not be ready to renew an agreement which, if the decision of the court below should stand, will have the effect of causing them to pay overtime on overtime. Indeed when it became known in 1945 that such a suit as the one now in question would be filed, the employers insisted upon inserting in the agreement a provision for renegotiation in the event that the overtime arrangements in this industry should be construed by the courts in such a manner as to negate the intent of the parties. The union resisted such a clause, but finally was compelled, as a part of the price of securing agreement, to assent to its inclusion.

The members of the I.L.A. well know what disaster such renegotiation may bring to them and how greatly they can be harmed if the overtime provisions which they have fought for for so many years and which are so far superior to the requirements of the F.L.S.A. should be changed. (See testimony of Joseph P. Ryan, President of the I.L.A., Record, 167-197.)

The trial court fully appreciated the danger, stating, in its opinion:

"It is clear that the application of either of plaintiffs' formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American history.

"Such catastrophic results are inevitable once we accept plaintiffs" underlying premise—that in determining the regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise genuine collective bargaining cannot live." (Record, 586)

The danger to the longshoremen is real—and immediate. The very foundations of free collective bargaining are threatened—and we cannot believe that it was the purpose of Congress that the F.L.S.A. should be construed so as to make it such a threat.

It is a matter of historical record that it was the labor movement, of which the I.L.A. is a part, which was the prime mover in securing, first by collective agreement, and then through the reinforcement of laws a floor under wages and a ceiling over hours. The Fair Labor Standards Act was finally passed by Congress as the result of a public opinion which demanded for the unorganized workers at least some of the gains which had been won by organized labor.

It is inconceivable that it was the intent of organized labor, in supporting such legislation, to have it supplant free collective bargaining, or that it was the purpose of Congress that the standards set by such legislation should supplant the superior standards previously set by collective bargaining.

Congress, in passing the Fair Labor Standards Act, had for its overall purpose advancement of the social and economic position of labor by setting a floor under wages and a ceiling on hours. But, surely, it never contemplated that the law should be so construed as to hurt labor.

In the longshore industry particularly would workers be hurt by such a construction of the Act, because it would cut the groundwork from under those clauses of their agreements which were especially designed to meet the problems of their industry and to meet their problems as workers in that industry. For example, the longshore industry unfortunately does not provide steady employment for its workers. All too often it does not provide a full week of work. Under the agreements which the longshoremen have won for themselves, under the agreement which the plaintiffs ask this court to treat as though it were a conspiracy to evade the provisions of the F.L.S.A., a longshoreman working from 1 P.M. to 9 P.M. three days in the week for a total of 24 hours, will receive not 24 times the basic hourly rate of pay, but will receive instead 30 times the basic hourly rate of pay. Thus workers who find themselves, because of the peculiar conditions of the longshore industry, in the position of having to work 7 or 8 hours a day for a total of less than 40 hours a week, nevertheless secure overtime pay for a considerable portion of the hours they do work. As the trial court found: "There was 8.50 times as much contractual 'overtime' as there was overtime, measured by the number of hours in excess of 40 worked for one employer (Record, 607): - It is this economic gain, among others, which is threatened.

The union, ever since its existence, and by written contract since 1916, has consistently fought to maintain payment of overtime for all work done outside of the specified regular daytime hours.

This type of overtime pay is not peculiar to the longshore industry: there are thousands of collective agreements in which premium avertime pay is provided for certain hours not because they are in excess of a given number, but because they fall outside of certain specified hours of the day. In the longshore industry, however, the peculiar nature of the industry makes such a provision especially important, for in the longshore industry there is constant pressure on the employers to work around the clock.

To make it possible for its members to live normal lives like their fellow citizens, to work during the hours when other men work, to spend time with their families, the union has had to resist this pressure consistently. It has placed high penalty overtime rates on all hours outside the day-time hours, so as to make around the clock work too expensive for the employers, except in case of absolute need. This device has proved successful in concentrating long-shore work during the regular daytime hours.

The trial court found, as a fact, that concentration of work during the basic working day was almost 8 times as great as during the other 16 hours of the day from 1932 to 1937. During the 10 months period from passage of F.L.S.A. to shortly before the outbreak of the war, this concentration was 6 times as great. Even during the last full war year, when pressure of round the clock work was greatly increased, due to the need of getting ships out of the port as quickly as possible, concentration of work was 2.4 times as great during the daytime hours as during the other 16 hours of the day (Record, 608).

If the decision of the Circuit Court of Appeals should stand, this concentration of work during the daytime hours, for which the union has so long fought, would be menaced.

It must be recognized that it is difficult enough for a union, in negotiations with its employers, to secure for its members conditions which are an advance upon those which generally prevail in American industry, even where its position on the merits is unassailable. It would be far more difficult for the union to secure such conditions when the employers can point to a law that piles a statutory penalty on a penalty for overtime already exacted by the workers.

The I.L.A. and its members should not be placed in the position of having to resist the employers' demand for a revision of the overtime provisions in the contract.

The Issue

The ultimate issue involved in these cases, is whether the "straight time" rates of pay for the basic working day as defined in the collective bargaining agreement between the New York Shipping Association and the I.L.A., are regular rates of pay within the meaning of the Fair Labor Standards Act.

During the period in suit, if a man worked 41 hours, 35 of them within the basic working day, and 6 hours outside the basic working day, his compensation was 35 times the straight time hourly rate plus six times the contractual overtime rate. Since the contractual overtime rate was one and one-half times the straight time rate, he was therefore paid 44 times the straight time hourly rate instead of 41½ times the straight time hourly rate required by the F.L.S.A. If a man worked 41 hours, all of them outside the basic working day, he was compensated for all 41 hours at the contractual overtime rate. Thus he received 61½ times the straight time rate per hour for the 41 hours that he worked.

The District Court in its opinion, held that "the collectively bargained agreement established a regular rate" (Record, 591) and concluded, that the "straight time"

hourly rates set forth in the collective bargaining agreements constituted the "regular rates" at which respondents were employed and that the employers had complied with the requirements of Section 7a of the Fair Labor Standards Act, except in certain minor respects, which are not in dispute (Record, 617).

The court below disagreed with the trial judge. While holding that his findings "are supported by the evidence" it reversed him, and set up a different "regular rate" of pay than the "straight time" rates provided in the contract.

History of Labor Organization in the Longshore Industry With Special Reference to the Development of Overtime

A brief history of the I.L.A. and its predecessor organizations will help to clarify the issue involved in these cases.

Local erganizations among the longshoremen here and there precede the Civil War. In New Orleans the cotton screw men are reported to have had an organization as early as 1850 that included nearly all the white screw men in the port.1

In San Francisco there was a Riggers and Stevedore's Union as early as 1853.

. The local organizations among longshoremen before the Civil War on the Atlantic Coast, were of an ephemeral character.2

Stronger local organization followed. In the middle 80's in the hey-day of the Knights of Labor, many of the

lished in 1915.)

^{1.} Herbert B. Northrup, "The New Orleans Longshoremen" Political Science Quarterly, Vol. LVII (Dec. 1942), p. 526.

2. Charles B. Barnes, The Longshoremen, pp. 93-95. (This book was pub-

longshoremen in the North Atlantic Ports joined that organization. In New York, the loss of a long strike in 1887 led to the decline of the Knights of Labor and indeed of all organization among the longshoremen in that nort.3 In Boston assemblies of the Knights of Labor were the most important organized group of longshoremen down to 1912.

It was not until 1914 that there could be said to be a real national organization of longshoremen. This was the International Longshoremen's Association, affiliated with the A. F. of L., which has remained the all-embracing union in the industry since that time, except on a part of the Pacific Coast. There a dual, rival union, going under the name of the International Longshoremen's and Warehousemen's Union, headed by one Harry Bridges, was set up about 12 years ago. This union, in the view of the I.L.A., is Communist dominated. Ever since it was founded, it has sought to make inroads on the I.L.A., in the port of New York, as well as in other areas where the I.L.A. is the sole union having collective bargaining agreements with the employers, covering the longshoremen.

International Longshoremen's Association was The founded in 1892. Originally it was named the Lumber Handlers of the Great Lakes. In 1893 it became affiliated with the American Federation of Labor as the National Longshoremen's Association of the United States, but shortly thereafter it adopted its present name.5 In 1902 it changed its name to the International Longshoremen's

^{3.} Bureau of Statistics of Labor of New York, 5th Annual Report: For the Year 1887, pp. 327-385; Barnes, op. cit., pp. 95-108.

4. The Longshoreman, Vol. IV, No. 3, (Apr. 1913), p. 1; Massachusetts State Board of Conculation and Arbitration, 27th Annual Report, 1912, pp. 13-16.

5. Lloyd G. Reynolds and Charles C. Killingsworth, Trade Union Publications, Vol. 1, p. 95

Marine & Transport Workers Organization. By 1909 the organization had resumed its former name, the International Longshoremens Association, which it still retains.

As early as 1872, the New York unions in the longshore industry were demanding extra rates for night work.

The day was then from 7 A.M. to 5 P.M. with an hour out for dinner. On sailing vessels very little night work was done.7 It was the steamships that caused the pressure. The piers were small for the expanding traffic and the foremen were taking advantage of the fact that there was no penalty rate for night overtime to order more work at night, "when there were no teams to interfere. The men protested against this, and with a desire to cut out the excessive night and Sunday work, they demanded a high rate for these times. In 1872 this demand procured them an advance to 40 cents an hour for day work, 80 cents for night work and \$1.00 for Sundays".

These rates could not be held during the depression. After a strike they were lost and double time for the night hours and double time and one-half for Sunday went with them; the day rate was reduced to 30 cents.

However, when organization revived, the men tried to get the double time back and succeeded on many piers by quitting at the end of the day unless the double time were paid.10 In the 1887 strike, one of the demands was for double time for night work in order to eliminate night work during the hot weather.11 The loss of the strike

^{6.} Proceedings, I.L.A. 1902, pp. 152-160. The Proceedings from 1902 to 1908 ate those of the I.L.M. & T.A., but they will be cited herein merely as Proceedings, I.L.A.

^{7:} Barne op. cit., p. 79. 8. Barne. . . cit., p. 77

^{9.} Barnes, op. cit., pp. 77-78.
10. Barnes, op. cit., p. 78.
11. Board of Mediation and Arbitration of New York, First Annual Report, 1887, p. 436.

ended double time. But the employers announced that they would pay 30 cents per hour for day and 45 cents per hour for night work.

Since that time the organized longshoremen have tenaciously held to the time and one-half rate for night work.

On the Atlantic Coast the rates in New York had settled down by the end of the century to 30 cents an hour for day work and 45 cents an hour for night or Sunday work. In 1907 the longshoremen struck and demanded 40 cents for day work and 60 cents for night work and other overtime. But the rates remained at 30 cents and 45 cents until 1912, when they were advanced to 33 cents an hour for day work and 50 cents an hour for night overtime. The day was 10 hours. This advance in the day rate and the night overtime rate was announced by the employers after a demand for an increase had been made by the unions.

The I.L.A. began trying for an agreement for the Port of New York as early as 1910 at least. The District Council, Port of New York, I.L.A., in November of that year demanded of the employers that overtime should be counted from 7 P.M. till 12 midnight, and 1 A.M. to 6 A.M., and that all national, state and municipal holidays should also be counted as overtime.

The first signed agreement for the Port of New York was made in May, 1916. The day rate was set at 40 cents per hour; the night rate and the holiday rate (except Christmas and Fourth of July) at 60 cents and the rate for Sundays, Christmas and Fourth of July at 80 cents. In the 1917-18 agreement, the rates were

^{12.} Barnes, op. cit. p. 111.

^{13.} Barnes, op. cit., p. 117. 14. New York Times, July 30, 1912; U. S. Commission Industrial Relations, Vol. III, pp. 2069, 2092, 2199, 2115, 2122.

advanced again to 50 cents, 75 cents and \$1.00 with Labor Day added to the double time helidays. On the union's insistence, the day was reduced to 9 hours—the regular day ending at 5 P.M. and the hour from 5 to 6 P.M. being added to night work.

After the outbreak of the First World War, the National Adjustment Commission, hereinafter also referred to as the N.A.C., was set up in August, 1915, on the initiative of the United States Shipping Board "for the adjustment and control of wages, hours and conditions of labor in the loading and unloading of vessels." The original parties to the agreement, in addition to certain government agencies, were the I.L.A., the American Federation of Labor, and the principal shipping operators on the Atlantic and Gulf Coast.

In 1918, the National Adjustment Commission handed down a uniform wage for the Atlantic Coast Ports, effective October 1, 1918, in which it fixed a uniform scale of wages and hours, for both deep sea and coast wise longshoremen, "The basic working day" was reduced to 8 hours with Saturday a half holiday. A 9 hour day had prevailed not only in New York, but in Boston, and a 10 hour day in Baltimore and Hampton Roads District. The award did away with double time for Sundays and holidays—the men had asked for double pay for all overtime.

The regular hours were set at 8 A.M. to 12 noon and 1 to 5 P.M. on weekdays, exclusive of Saturdays. "All other time shall be counted and paid for at the rate of \$1 per hour" (as contrasted with 65 cents for the regular hours)."

^{15.} N.A.C., Chairman's Report, pp. 146-150.

With some interruptions during the depression years, the New York rates have climbed steadily since 1918 until they reached the straight time hourly rate of \$1.25 and the overtime hourly rate of \$1.87½ for general cargo that prevailed under the agreement in question in these cases. Rates for special types of cargo ranged as high as \$2.50 per hour straight time, and \$3.75 per hour overtime.

Specification of Errors to Be Urged

- 1. The court below erred in failing to find that the straight time rates of pay in the contracts involved herein are the regular rates of pay within the meaning of the F.L.S.A.
- 2. The court below erred in failing to hold that the overtime rates in the contracts herein involved were true overtime rates.
- 3. The court below erred in its application of the per-

Summary of Argument

- Point I. The court below erred in failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, in which respondents and other longshoremen were employed during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7a of the F.L.S.A.
- A. The basic working day of 8 daytime hours as set forth in the collective agreement was the regular working

day for the longshore industry, both by intention of the parties and in actual fact. It was therefore the regular working day for all longshoremen; and the hourly rate of pay—the contractual straight time rate—was the regular rate of pay for all longshoremen, including the respondents.

- B. The provisions of the agreement measuring overtime by all hours worked outside of certain specified daytime hours were consonant with the purpose of Congress, and effectuated the purposes of the Act.
- C. If the decision of the court below should stand, the intent of Congress would be frustrated.
- D. As a matter of law, the I.L.A. and the employers had a right to contract for a regular rate so long as it was not less than the statutory minimum rate—and which in our cases was three times the statutory minimum rate—and an overtime rate so long as it was not less than the statutory 150 percent of the regular rate.

Point II. The court below also erred in failing to hold that payment of one and one-half-times the "straight time" rates set forth in the collective bargaining agreements for all work performed outside the 40 basic hours—the "straight time hours"—in any work week in the period in suit satisfied the requirements of Section 7a of the F.L.S.A. with respect to payment of overtime compensation.

A. The contractual overtime rate was a true overtime rate by whatever test may be applied and therefore not the regular rate.

B. The contractual overtime rate was not a shift differential, as contended by respondents, and therefore there was no basis for holding it to be a regular rate. C. The contemporaneous acts of the same negotiating committees which negotiated the General Cargo Agreement in deliberately providing different treatment where true shifts and not overtime was involved, show that the contractual overtime rate was a true overtime rate, and therefore not the regular rate.

POINT III. The court below further erred in its application to these cases of the pertinent decisions of the Supreme Court.

- A. None of the cases relied on by the court below, have a substantial factual relationship to the instant cases.
- B. The vices which the Supreme Court found in the overtime wage arrangements in the cases relied on by the court below are not present in the instant cases.

ARGUMENT

POINT I

The court below erred in failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, in which respondents and other longshoremen were employed during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7a of the F.L.S.A.

A. The basic working day of 8 daytime hours as set forth in the collective agreement was the regular working day for the longshore industry, both by intention of the parties and in actual fact. It was therefore the regular working day for all longshoremen; and the hourly rate of pay—the contractual straight time rate—was the regular rate of pay for all longshoremen, including the respondents.

The irregular character of work in the longshore industry has posed a constant challenge to the union to bring about as high a degree of regularity as possible. It has succeeded in doing so, by securing overtime compensation for hours worked outside the basic daytime hours, so that there is a high degree of concentration of work during the daytime hours.

The findings of fact of the trial court show how high a degree of concentration has been achieved. The trial court found that:

"Statistical studies of 'straight time' and 'overtime' work in the Port of New York show:

"(a) For the years 1932 to 1937, inclusive, the records of stevedoring companies, averaging six in number, in such years show that, on the average 79.93 per cent of the total number of hours worked were within the 'basic working day' as defined by the Collective Agreement. During the ten months between the effective date of the Fair Labor Standards Act. October 24, 1938 and August 31, 1939, shortly before the outbreak of the war, the corresponding percentage was 75.03 per cent, based upon a study of 17 stevedoring companies, together handling 70 per cent of the volume of work in the port." (Record, p. 606)

and

"(d) During the last full year of war experience before V-E Day, namely the last three-quarters of 1944 and the first quarter of 1945, 54.5 per cent of total man hours fell within the 'basic working day' as defined by the Collective Agreement." (Record, '607)

Moreover, as already pointed out, the trial court also found, as a fact, that concentration of work during the basic working day was almost 8 times as great as during the other 16 hours of the day from 1932 to 1937. During the 10 months' period from passage of F.L.S.A, to shortly before the outbreak of the war, this concentration was 6 times as great. Even during the last full war year, when pressure of round the clock work was greatly increased, due to the need of getting ships out of the port as quickly as possible, concentration of work was 2.4 times as great during the daytime hours as during the other 16 hours of the day (Record, 608).

This concentration of work during the contract straight time hours was reflected in the regular hours of related industries and services. As the trial court also found:

"Various employments which are intimately related to the handling of cargo are established on the basis of a working day of eight hours, from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M. This applies to the handling of cargo going off the pier by trucking companies and the clerical operations of steamship employees, painters, carpenters, cleaners and the like, and to Custom inspectors. The Collector of Customs at the Port of New York has determined hours, from 8 A.M. to 5 P.M. with one hour out for lunch, to be the normal working day for the loading and unloading of the vessels in the Port of New-York. In the case of foreign shipments, work outside of those hours may be carried on only on a special permit issued by the Collector." (Record, 611, 612)

As the Supreme Court said in the case of Walling v. Helmerich and Payne (footnote), 323 U.S. 37, at page 40:

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime work week."

The Standard Dictionary of the English Language, 1893 dedition, defines "Regular" as

"1. Made according to rule; formed after a uniform type, conforming to a consistent plan; symmetrical; normal;"

and defines "normal" as

"1. According to an established law or principle; conformed to a type or standard, regular or natural, as in character, formation or action;"

and gives as synonyms common, natural, ordinary, regular, typical, usual.

In actual practice, the words "straight time pay", "basic rate of pay" and "regular rate" are interchangeably used. This is true not merely of workers who are not concerned with precise shades of distinction in the language they use, but of experts who are necessarily concerned with precision of meaning.

As an example, we cite a pamphlet containing rulings and interpretations on the Walsh-Healy Public Contracts Act (49 Stat. 2036; U. S. C. 41, Secs. 35-45), issued by Mr. I. Metcalf Walling, Administrator of the Wage and Hour and Public Contracts Divisions, United States Department of Labor. The citations herein are from a reprint of this pamphlet which appears in 2 C.C.H. Labor Law Service, 3rd Edition. Section 42 of this pamphlet headed "Overtime Compensation" contains the following language under Subdivision (d) Paragraph (1):

"Whenever an employee works on a government contract subject to the Act for any part of a day in a given payroll or work week (after his employer has commenced and before the employer has completed work on the contract) he is entitled to be paid one and one-half times his basic rate of pay for all hours worked in excess of eight on that day * * *."

C. C. H. page 35,418. (Emphasis supplied.)

Paragraph (4) contains the following language:

The Public Contract Act contemplates the payment of daily or weekly overtime compensation as extra compensation in addition to the straight time compensation for the non-overtime hours in the work week. In order to comply with the overtime requirements of the Act, therefore, an employer must pay an employee who works overtime both the amount legally due for the non-overtime hours worked in the week (normally computed at the em-

ployee's basic rate, where no deductions are involved), and compensation at one and one-half times the employee's basic rate of pay for the overtime hours worked. As noted in subsection (e) (9), below, the employees' basic rate of pay can in no event be less than the legal minimum." C. C. H. page 35,419 (Emphasis supplied.)

Under Paragraph (e) there appears the following language:

"If the employee is compensated on a weekly salary basis, his basic or regular hourly rate of pay, on which time and one-half must be paid for overtime work, will be computed by dividing the salary by the regular number of hours worked to earn that salary ". "C. C. H. page 35,419. (Emphasis supplied.)

These are only a few of the cases where these words are used interchangeably.

Taken together, the facts cited above show that the regular or normal work day for longshore industry and its workers consisted of the daytime, contractual straight time hours.

And since the straight time hours were the regular, normal hours for the workers taken as a whole, they were, for the purposes of Section 7a, the regular, normal hours for the respondents, and the rates of pay for such regular normal hours were the regular rates of pay of the respondents.

Any other conclusion requires that one of the fundamental purposes of collective bargaining, namely that it shall serve as an agency of industrial order, be ignored. The Encyclopedia of the Social Sciences, in the article on Collective Bargaining, states it thus (Vol. 3, p. 629):

"It is through the trade agreement, which is subsumed in the labor contract, that collective bargaining becomes an agency of industrial order. The trade agreement, which specifies how jobs and workmen are to be brought together in production, like a creed or a code, is of slow and tangled growth; the repetitious process of bargaining is the procedure by which the scheme of employment relations is built up and maintained. The general understanding is primarily concerned with wage rates; it is easily extended to the times and methods of wage payment, hours of labor, compensation for overtime, fines for infractions of rules, allowances for dead work, the protection of life and limb and hiring and firings It may lay down the conditions of work in great detail, incorporate a code of working rules or specify technical practices, ways of handling materials, methods of checking results and standards of performance to test the competence of workmen. It gives nominal acceptance og even official sanction to customs, practices and procedures which have gradually grown up in a trade or industry. The constructive use of collective bargaining and the enforcement of trade agreements demand strong and continuing organizations and the faithful performance of obligations on both sides." (Emphasis supplied.)

Where there is a scheme of industrial order covering 30,000 workers, that scheme embraces within its borders all of the workers, where, as here, they are included in the general scheme and there is no express provision for their exclusion. For if the "customs, practices and procedures" which are thought to govern all, are found instead to cover only a part, they will lose their force as to all, and even the part will suffer.

Collective bargaining, to be effective, must necessarily deal with large groups-with all the workers in the industry, or its subdivision, on whose behalf the bargaining is being conducted. And when, as in the I.L.A., such collective agreements are submitted to a vote of the membership affected, and that approval of the bargain thus arrived at is voted, it would make of collective bargaining a mockery if some of them could seek special terms, because, for a short period of time, their work experience has varied in some degree from that of their fellow Under the terms of the collective agreements considered in our cases, all the workers benefited from the straight time rate. All the workers benefited from the fact that under certain conditions overtime rates were payable even before 40 hours had been worked. And all the workers were subject to the rare possibility-how rare is shown by the statistical data before the trial court -that they might sometime work more than 40 hours at night, and not receive overtime pyramided on overtime, where, as in our cases, they were already receiving time and one-half for the first 40 hours. They embraced that possibility in their contract because of the tremendous benefits they gained and those benefits of collective bargaining, and the order and stability it brings to employer and employee alike, should not be lightly thrown aside, with the very great risk, as has already been shown, that these benefits will be lost to all the workers, including the respondents here.

The regular rate for the entire New York longshore industry, for all of the workers and all of the employers in the industry, was the straight time hourly rate of the

collective agreement.

As the Supreme Court stated in Walling v. A. H. Belo Corp., 316 U. S. 624, at pages 634, 635,

i'the problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting, such a definition because the employment relationships to which the Act would apply were so various and unpredictable and that which it was unwise for Congress to do, this court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artifical interpretation of the Act ••"

We respectfully submit that in the light of the facts in this case, it would require "an inflexible and artifical interpretation of The Act" to hold that the straight time daytime hours are not the regular hours within the meaning of the Act. The trial court was amply justified in finding that "the straight time hourly rate" constituted the regular rate at which plaintiffs were employed "" (Record, 617).

B. The provisions of the agreement measuring overtime by all hours worked outside of certain specified daytime hours were consonant with the purpose of Congress, and effectuated the purposes of the Act.

The Supreme Court has stated that the Act had a

"dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long work week". Walling v. Youngerman Reynolds Hardwood Company, 325 U. S. 419, 423. From the very beginning of American industrial history, organized labor fought for the shorter working day and its chief device toward that end was the establishment of a punitive rate—generally 150% of the regular rate—for overtime (Record, 328, 421, et seq.).

Congress did not, with the passage of the F.L.S.A, introduce a new concept into American industry, but adopted a concept which was already firmly rooted in the unionized trades, namely, that a premium of 50% for overtime work would act as a deterrent to working a long day or a long week and would compensate the employees for the burden of a long work week. The payment of premium overtime rates has been a prominent. feature of trade union history for more than a century. here and abroad. Sydney and Beatrice Webb, in their standard work on British Trade Unionism, Industrial Democracy, written in 1897, point to the fact that as early as 1836, the London engineers, after a successful strike, secured a 60 hour week and "the penalizing of overtime by extra rates" (p. 340). In a later passage, they state that the 1892 agreement for the building trades in London "with extra rates intended to penalize overtime, is only one of the latest of a practically unbroken series of collective agreements" (p. 341).

The Iron Molders Union, one of the oldest of American trade unions, adopted a rule at its 1876 National Convention, that 10 hours should be recognized as "a legal days' work", the hours to be worked between 7 A.M. and 6 P.M. (emphasis supplied), "with overtime in the same ratio as to all other mechanics" in the immediate vicinity". In 1895 the overtime rate was made specifically

^{16.} F. T. Stockton, The International Molders Union, p. 161.

time and one-half with double time for Sundays and holidays.17

The oldest of the American National Unions, is the Typographical Union. The late Professor George E. Barnett, one time President of the American Economic Association, in his standard work on this union, The Printers, published in 1909, stated: "The distinctive characteristic of regulations aimed at reducing the length of the working day . . . is the requirement of a considerably higher rate for overtime than for 'time' " (p. 157).

After pointing out that the overtime rate varied in different localities, Professor Barnett wrote: " * the eight hour day has been more fully established, the local unions have increased their overtime rates." In 1910 the overtime rate in the printing industry was ordinarily one and ene-half times the straight time rate.18

In the Molders Union, Stockton states: "The international officers have always tried to discourage overtime. because 'it takes work away from the unemployed' and . because tired men cannot do good work".18

Barnett said of the Printers Union: "The aim of the union is to reduce the hours of work and not to get extra pay . . although it cannot abolish such work entirely, it means to make overtime as undesirable employers as trade conditions will permit."20

In What's What in the Labor Movement, compiled by Waldo R. Brown and published in 1921, we find (p. 363) . the following under the heading "Overtime":

> "Time worked beyond the number of hours established by COLLECTIVE BARGAINENG, by

Stockton, vp. 5t., p. 167.
George E. Barnett, The Printers, pp. 157-158.

Stockton, op. cit., p. 167. Barnett, op. cit., p. 159.

custom, or by law as comprising the NORMAL DAY OR WEEK in a particular industry, occupation, or industrial plant, or time worked on Sundays and holidays, is so called. The increased rate of pay commonly demanded by organized employees for such extra working time is often known as 'punitive overtime', the trade union theory being that it is usually unnecessary and always undesirable to have overtime, and that the increased rate of payment is a penalty against the employer and intended to act as a deterrent."

As already stated, the American Molders Union thought it necessary in 1876 to support the ten hour day rule with a statement that the hours must be between 7 A.M. and 6 P.M. In 1895, an addition was made to the rule that work between twelve and one was, to be avoided if practicable.²¹

As the Molders Rule of 1876, indicates, the hours outside those specified for the regular working time, are regarded as overtime and are to be paid for at higher rates.

We cite the Molders only because it was one of the earlier unions that was able to enforce overtime pay. It was neither the only union nor the first union; nor was it the only union which required payment cutside certain hours specified as regular working time at an overtime rate. That has been common practice in many trades for varying lengths of time. One reason for this practice is that it simplifies enforcement of the overtime premium. For example, without such a provision, a worker and employer who might wish to avoid the payment of an overtime premium, could deceive the union by claiming that work

^{21.} Stockton, op. cit., pp. 161-167.

had been begun at, let us say, one o'clock in the afternoon and that work being done at eight o'clock in the evening, was therefore not overtime but part of the regular eight hour day. Obviously however, this problem of enforcement disappears where all hours outside of the specified regular working hours are considered overtime.

Another reason for the growth of the practice, has been a desire on the part of workers generally, to confine their work to the normal working hours of the neighborhood, community or trade and to render it difficult for employers to demand their services during hours which the bulk of the population normally spends at home or in the pursuits of leisure. It was this latter reason that was the motivating force in the longshoremen's demands for overtime premium pay outside the regular working hours (Testimony of Joseph P. Ryan, Record, p. 173).

In addition, there was a special motive in the case of the longshoremen, "to de-casualize longshore work as much as possible." (Testimony of Ryan, Record, p. 189).

Among the industries, where overtime rates must be paid for hours outside certain specified day time hours as such, "are the carpenters, steamfitters, sheet metal workers, painters, electrical workers, cement and asphalt workers, stereotypists, breweries, optical technicians, machinists, glaziers, boilermakers, automobile workers, printing pressmen, retail delivery drivers, boot and shoe workers, and leather workers, and furniture workers." (Testimony of Prof. Taft, Record, p. 339). Also, "the building trades, the metal trades "scattering other industries" (Testimony of Prof. McCabe, Record, p. 426).

It could not have been the purpose of Congress to supplant overtime arrangements already a part of the American industrial pattern, which also had as their

The report of the Senate Committee on Education and Labor on the Fair Labor Standards Act (S. 2475, 75th Cong. 1st Sess.), presented by Senator Black who had introduced the bill, says: (Sen. Rep. 884, 75th Cong., 1st Sess., pp. 3-4.)

"It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment wherever there can be any real, genuine bargain between them. It is only those low wage and long-work-hour industrial workers who are helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." (See also, 81 Cong. Rec., pp. 7650, 7808.)

And the report of the Committee on Labor to the House on this bill, as amended, says:

"The bill is intended to aid and not supplant the efforts of American workers to improve their own position by self-organization and collective bargaining." (House Report No. 1452, 75th Cong. 1st Sess., p. 9.)

And in speaking of the bill, as presented in the Special Session, the Chairman of the Committee, Representative. Norton, said:

"It is intended to protect employees who are not protected by collective bargaining agreements." (82 o Cong. Rec., p. 1990.)

Moreover, Congress must be presumed to have known that the unionized trades had, over a period of years, worked out overtime arrangements which were more favorable to the workers in them, than the 50 percent penalty premium on excessive hours-that for example some unionized trades imposed a penalty premium of 100 percent on overtime hours and that a number of the best organized trades imposed penalty premiums not merely for excessive hours but for hours outside of a regular or normal or basic working day. It could certainly not have been the purpose of Congress that the F.L.S.A. be so interpreted as to place additional statutory overtime penalties on industries which had already granted to their employees, as a result of union insistence, more favorable overtime provisions than the statute was to provide. The purpose of Congress was to limit the working day by imposition of a penalty premium of 50 percent for overtime. The trial court found as a fact, that in the Port of New York, "the 50 percent overriding charge for work done during 'overtime' hours, is a deterrent because of the added cost . " and that "the steamship companies in the Port of New York, have preferred to confine the handling of cargo to "straight time hours' to the greatest possible extent" (Record, 603).

The trial court further found that "the objective of organized labor has been to shorten the total number of weekly hours." A mechanism for accomplishing this result has frequently been to schedule an approved tour of daily hours to be compensated for at a straight time rate and to classify all other hours as overtime hours compensated at an overtime rate. The employment of the 50 percent premium for such overtime hours, was designed to constitute a deterrent and not a pro-

hibition. Such 50 percent premium in the longshore industry has proved to be effective as a deterrent and is responsible for the high degree of concentration of longshore work in the Port of New York to the basic working day." (Record, 612).

The trial court's findings of fact based on statistical studies introduced into evidence, would also indicate that the overtime device used in the longshore industry tends to reduce hours of work and to cause the employment of more men. For example, the court found that during the 10 month period from October 24, 1938, the effective date of the F.L.S.A., to August 31, 1939, shortly before the outbreak of the war, only 8.05% of the longshoremen who worked in the Port of New York, worked more than 40 hours a week for one employer. Similarly the trial court found that the percentage of total hours worked for one employer, which is represented by work in excess of 40 hours per week, was 2.94 percent (Record, 607). Similarly the court found that during the last full year of war experience before V.E. Day, 44.5 percent of total "overtime" man hours worked between 5 P.M. and 8 A.M. (exclusive of Sundays and holidays) was worked by men who had done no work previously during the straight time working day (Record, 607, 608).

All these figures lead irresistibly to the conclusion that the overtime device used in the longshore industry had the result of inducing the employers "to employ more men". Moreover, under the contract, the men were compensated for the burden of long hours at the statutory rate.

Thus the "dual purpose" of the Act has been achieved under the collective agreement in the Port of New York and the method of overtime compensation adopted in the Port of New York is therefore in consonance with the purpose of Congress.

C. If the decision of the court below should stand, the intent of Congress would be frustrated.

As we understand the decision of the court below, it holds that the regular rate is to be determined by dividing the wages actually paid by the hours actually worked. Then, of course, overtime rates would be determined by taking 150% of the regular rates thus computed.

We base this reading of the decision of the court below on the following portions of the decision:

Cementing Co., — U. S. — (April 14, 1947), the Court stated that in Overnight Motor Co. v. Missel, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked.' See also Ferren v. Waterman S. S. Co., supra; cf. Walling v. Scholl-

horn, 54 F. Supp. 1022.

that theretofore, where an employee received more than one rate during a workweek, the Administrator had ruled that the employer must pay the employee an 'overtime rate of one and one-half his average hourly earnings for the entire week, computed by dividing the weekly earnings at both rates by the total number of hours worked in the week,' but that thereafter an employer would have an option, in the alternative, to compute the overtime rate at one and one-half times the rate at which the employee worked during the hours in excess of forty. However, this Release was later qualified by Press Release 1913 A, which stated, 'In order to take advantage of this (revised) rule, the records of the

overtime compensation he had determined to follow.'
Nothing in the evidence here indicates that either defendants so kept its records." (Reported at 162 F. 2d at pp. 669-70.)

If our reading of the decision of the court below be correct, and the regular rate in our cases is to be determined not by the contract, but by dividing the wages actually paid by the hours actually worked, then the intent of Congress, that hours in excess of 40 should be compensated at one and one half times the regular rate, would be frustrated.

The F.L.S.A. by its terms indicates that the purpose of Congress was to impose an overtime rate as a deterrent to working excessive hours, the measure of non-excessive hours being first 44 then 42 and at the time of the acts complained of in these case, 40 hours per week.

The Congress set the penalty premium for overtime work at 50% of the regular rate. Congress did not intend that the penalty premium should constitute a prohibition, but merely a deterrent. Stated differently it is clear that the purpose of Congress was that where an employer, for whatever reason, felt the need for working more than 40 hours a week, he could do so upon the payment of 150% of the rate for the first 40 hours. But under the decision of the court below, there is no possible combination of circumstances in the longshore industry by which an employer operating in the day time hours during the first five days of the week, can work overtime on payment of one and one half times the hourly rate paid for those day time hours.

For example, if we assume that an employer has worked his employees eight day time hours from Monday through Friday, plus one additional hour on Friday, then under the decision of the court below, the employees' wage for the 41st hour would be 1.51 times their hourly rate for the first 40 hours.22

If he has worked nine hours each of the first five days of the week or five hours overtime then the employees rate per hour for the 41st to 45th hours will be 1.58 times the hourly rate for the first 40 hours.23

If he worked two hours overtime each day, or a total of 10 hours overtime, then the overtime rate for the 41st to the 50th hours would be 1.65 times the hourly rate for the first 40 hours.24

Thus instead of the employer paying 1.50 times the 40 hour rate after the first 40 hours, he will payovarying amounts ranging from 1.51 times the 40 hour rate for one hour of overtime to 1.38 times the 40 hour rate if he works 5 hours overtime to 1.68 times the hourly rate if he works 10 hours overtime, and higher with each additional hour of overtime work. To compel an employer to pay more than 150% of the rate for the first 40 hours, for overtime after 40 hours, is indeed to substitute the judgment of the courts for the clear mandate of Congress.

This result would not only fustrate the purposes of the Act, but would prevent the I.L.A. and other unions, from

^{22.} The calculation is as follows (assuming a straight time rate of \$1 per hour for ease of calculation): The "wages actually paid" are \$40 for the first 40 hours plus \$1.50 for the one hour overtime, or \$41.50. The "hours actually worked" are 41. The regular rate is therefore \$41.50 divided by 41 equals \$1.01. The overtime rate is therefore one and one half times \$1.01, or \$1.51 per hour.

The evertime rate is therefore one and one half times \$1.01, or \$1.51 per hour, or 151% of the straight time rate.

23. \$40 for the first 40 hours plus \$7.50 for the five overtime hours equals \$47.50 "wages actually paid." \$47.50 divided by 45 ("hours actually worked") equals \$1.05 regular rate. The overtime rate is therefore \$1.05 plus 53 cents, or \$1.58 per hour, or 1.58 times the straight time rate.

24. \$40 for the first 40 hours plus \$15 for the 10 overtime hours equals \$55 "wages actually paid." \$55 divided by 50 ("hours actually worked") equals \$1.10 regular rate. The overtime rate is therefore \$1.10 plus 55 cents, or \$1.65 per hour, or 1.65 times the straight time rate.

agreeing, in good faith to a regular rate and an overtime rate of 150% of the regular rate.

a D. As a matter of law; the I.L.A. and the employers had a right to contract for a regular rate so long at it was not less than the statutory minimum rate—and which in ou. cases was three times the statutory minimum rate—and an overtime rate so long as it was not less than the statutory 150 percent of the regular rate.

Employer and employee may establish the regular rate by contract. Walling v. A. H. Belo Corp., 316 U. S. 624, 631. Public policy favors collective bargaining National Labor Relations Act, 29 U. S. Code, Sec. 151. Labor Management Relations Act of 1947, 29 U. S. Code Sec. 151, as amended by Act of June 23, 1947, Public Law 101, 80th Congress. It follows as a matter of public policy, therefore, that the employer represented by his trade association and the employee represented by his union, may establish the regular rate by contract.

Moreover, if, as held in the Belo case, employer and employee may fix the regular rate in individual bargaining, and if it be held that such was the intent of Congress, then a fortiori it must be held that the Congress intended that they may fix the rate collective bargaining. For collective bargaining affords to the employees greater safeguards against oppression, and overreaching, than individual bargaining.

Congress has several times stated its belief in the superior protection afforded workers by collective bargaining. For example, in the National Labor Relations Act, Congress uses the following language, in the section on Findings and Policy:

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce by restoring equality of bargaining power between employers and employees."

The same language is used in the Labor Management Relations Act of 1947. 29 U. S. Code Secs. 151-166, Act of June 23, 1947, Public Law 101, 80th Congress.,

Similar language is used in the Norris-La Guardia Act, as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for the owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment wherefore it is necessary that he have full freedom of association, self organization, to negotiate the terms and conditions of his employment "". 29 U. S. Code, Secs. 101-115.

And Congress in the F.L.S.A. itself not only indicated its belief that the unions have a protective function with respect to their members, but that it was willing to rely upon this function of the unions to help guard against evasions of the law in the field of exemptions. Thus, in Section 7b, which provides for certain exemptions from the overtime provisions of the Act, these exemptions apply not where individual contracts have been entered into by the employer and employee, but only where collective agreements with a bona fide union have been entered into.

POINT II

The court below also erred in failing to hold that payment of one and one-half-times the "straight time" rates set-forth in the collective bargaining agreements for all work performed outside the 40 basic hours—the "straight time hours"—in any work week in the period in suit satisfied the requirements of Section 7s of the F.L.S.A. with respect to payment of overtime compensation.

A. The contractual overtime rate was a true overtime rate by whatever test may be applied and therefore not the regular rate.

As already pointed out, the contractual overtime rate had the effect of shortening the working day.

It was a punitive rate. As the Trial Court found, "stevedoring companies never worked any more 'over-time' than was necessary, because it was more economical for the steamship company and more profitable to the stevedores to work during 'straight time hours' "(Record, 602).

By the test of the parties' intention, it was a true overtime rate, for as the testimony shows, over a period of years, both the union and the employers in their negotiations and in their communications to their members, treated the night rate as an overtime rate (Record, 434, et seq.).

In this connection, it must be remembered that labor negotiations are usually carried on by laymen and not by lawyers and that their contracts are not always drawn with legalistic precision. But these laymen know what they are negotiating about and whether the terms they

use be precise or imprecise, they know what these terms mean.

In point of fact, the "night rate", the "hours outside the normal hours", the "hours outside the day-time hours" the "hours outside the basic working day"— whatever phrase one chooses to refer to the overtime hours, were referred to constantly as overtime, both in the negotiations between the parties, and, in one way or another, in all the Collective Agreements which put into written form the results of these negotiations.

The court below appears to have ignored this fact, and it seems to have drawn certain inferences, from the fact that in 1938 there was a change in the nomenclature used in the collective agreement, which we believe to be unwarranted by the record.

The court below noted:

"The annual collective agreements made with this union since 1921 have provided for a 'basic working day' of eight hours and a 'basic working week of forty-four hours. Beginning in 1918, these agreements fixed two sets of hourly rates: (1) Specified hourly rates were set for 'work performed from 8 A.M. to 12 Noon and from 1 P.M. 5 P.M.; Monday to Friday inclusive, and from 8 A.M. to 12 Noon Saturday; '(2) With a few exceptions, one and one-half times these rates, were fixed for what the agreements called 'all other time.' In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the agreement changed the labels for these respective periods: The first was now. called 'straight time'; the second was now called 'overtime rafes.' This nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits:

No other significant changes were made in the agreements after the Act went into effect." Reported at 162 F. 2d 655, at p. 666.

This statement is correct in so far as it goes, but it neglects to make an important qualification—that a most cursory reading of these same agreements which are in evidence (Defendant's Exhibit A), will show that from 1919 to the date of the agreement in question, the word "overtime" is constantly used, as we shall show immediately below.

The trial court found as a fact that

"The Collective Agreements did not employ the word 'overtime' for all hours outside the basic working day until 1938, but the use of the word 'overtime' occurs regularly in clauses relating to penalty cargo in all agreements commencing in 1918. Both the Union and the employers, during their negotiations, referred to such hours as 'overtime'". (Record, p. 611)

That is to say, when the agreements spoke of overtime generally, they used the phrase which had been imported into the language of the agreements by the National Adjustment Commission in 1918. But when questions concerning payment to be made for specific types of cargo carrying higher rates were dealt with in the agreements, the phrase "all other time" was replaced by the word that was synonymous with it in the minds of the parties, namely "overtime."

The phrase "all other time" as a synonym for overtime can best be understood in the light of its historical background, and in the light of that background it is clear that the change in labels noted by the court below was, merely a change which brought into accord with the nomenclature of the F.L.S.A. the nomenclature of an overtime arrangement which already complied with, and was greatly superior to, the overtime compensation requirements of the Act.

As already pointed out, until 1918 there had been three different rates in the longshore industry. These, were a straight time rate, a night time overtime rate of time and one-half, and a Sunday and meal time overtime rate.

of double time.

In 1918, the National Adjustment Commission handed down an award in which it fixed a uniform scale of wages and hours for the Atlantic Coast Ports. The basic working day which had been nine hours in New York and in Boston and 10 hours in Baltimore and the Hampton Roads District, was reduced to eight hours with Saturday a half holiday.

The men had asked for double pay for all overtime. The award not only did not grant double pay for all overtime, but did away with double time for Sundays

and holidays.

The regular hours were set at 8 A.M. to 12 noon and 1 to 5 P.M. on week days, exclusive of Saturdays. "All other times shall be counted and paid for at the rate of \$1.00 per hour" as contrasted with .65. The reason for this was, "it appeared that a tendency had developed in certain ports on the part of certain longshoremen to neglect regular work during the week in order to avail themselves of double time rates on Sundays and holidays and the wisdom of continuing three rates of pay was seriously questioned". Meanwhile, at the Port of Baltimore, separate night shifts were permitted at the day

^{25.} N.A.C., Chairman's Report, pp. 46-150.

rate.26 This had been the practice in Baltimore for some time. That port was still poorly organized in 1917."

This was the first time that the phrase "all other hours shall be counted and paid for at a fixed rate" was used in the agreements between the parties. This phrase was not of their own making, but was handed down in the National Adjustment Commission's award and the phrase itself was used because of a very special situation, the existence of two overtime rates which the National Adjustment Commission, sought to eliminate in favor of one overtime rate.

However, all other time was just as much overtime as though the word "overtime" had been used. When a dispute arose concerning the rate to be paid for work during the meal hour, the Commission issued a supplementary award in which it established particular hours for meals "except where local practice or agreement has established different meal periods." It allowed the setting forward or back of the meat period of one hour, "in case of emergencies", but provided "that where this is done, overtime rates shall be paid for the work done during the regular meal period."28 (Emphasis supplied.) (pp. 150-153.)

The Commission made a Gulf Deep Sea Longshore award on November 2, 1918. Here the 8 hour day was provided for at 65 cents "for regular time on all week days and all other time shall be accounted and paid for as overtime at the rate of \$1.00 per hour." (Emphasis supplied.)

In brief, as found by the trial court as a fact:

"In the Award rendered in 1918 by the National Adjustment Commission, the hours outside of the

N.A.C., Chairman's Report, p. 147.
Proceedings, I.L.A., 1917, pp. 25, 112, 113.
N.A.C., Chairman's Report, pp. 150-153.
N.A.C., Chairman's Report, p. 98.

basic work day were labeled overtime." (Record, p. 611.)

Thus, from 1918 to 1938, the parties to the Collective Agreements used "all other time" and "overtime" interchangeably, and overtime continued to be overtime, with the same deterrent force on long hours, and the same reflection of the intent of the parties, as it had always had. And since the contractual overtime rate was a true overtime rate, it could not be the regular rate.

B. The contractual overtime rate was not a shift differential, as contended by respondents, and therefore there was no basis for holding it to be a regular rate.

The attempt to convert the contract overtime rate of 150 percent of the regular rate, into a shift differential does violence to the statute and is as erroneous as it would be to convert a shift differential into an overtime premium.

There is a clear distinction and a vast difference between the two in the industrial life of our country. The record shows and the trial judge found that:

"A shift differential is a premium payment for work in either the second or third shift in a plant or industry where more than one shift is worked. The shift differential for the second shift is usually 5 cents or 10 cents per hour, and seldom exceeds 15 cents per hour.

"There is a difference between a shift differential and overtime premium. The former is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. The latter is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from

using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50 per cent of the normal rate." (Record, 605-606)

The Court below held that the findings of the trial judge are supported by the evidence in these words:

"In the instant case, the 'actual fact' concerning the 'regular rate' appears in the findings of the trial judge which are supported by the evidence and which we understand the defendants do not dispute." Reported at 162 F. 2d 665.

Respondents seek to give the impression that the requirement of time and a half pay for "all other time" in the agreements between the parties from 1918 to 1938 was made not because these were true overtime hours, but merely undesirable hours for which the workers have sought and the employers have given extra compensation—a sort of shift differential.

The first simple answer to this contention is that the record shows that both the parties that negotiated contract—the union and the employer—say in this record that such was not the fact; that it was not a shift differential; that never, throughout the whole series of agreements was it intended to be; and that they and the members of the union understood it to be overtime and nothing else. The record is barren of proof of any other intention or purpose in flegotiation or interpretation of the contracts. The intention of the parties is further treated under subdivision "C" below.

Secondly, another difficulty with the contention that the time and a half rate for all hours outside the basic working day was a shift differential for working undesirable hours is that the meaning of "all other hours" has changed not in accordance with the desirability or undesirability of certain hours of the day, but in accordance with the change in the number of the normal, regular, working hours of the day. When the regular working day was ten hours a day, all other time comprised fourteen hours a day. When the longshoremen had won for themselves the eight hour day, all other time comprised sixteen hours a day. In brief, "all other hours," rather than being merely undesirable hours, were in fact all hours of the week outside the regular agreed upon working week. That is to say, all other hours were always the overtime hours.

More specifically, respondents seek to identify these "undesirable" hours with night time hours, and contend that the 50% premium is to compensate men for working at night. Actually, of course, during the Spring and Summer seasons, only a part of the day outside the basic working day consists of night time hours. A considerable proportion are day time hours.

While it may be that intrinsically night time hours are less desirable working hours than the day time hours, there is no intrinsic undesirability in working from 5 to 6 that would appear to make that hour worth one and one-half times the hour from 4 to 5.

The whole concept of the 50% premium as compensation for working undesirable hours falls to the ground when it is remembered that under the agreements in question, four hours of work on Saturday morning—surely "undesirable" hours where the five day week is so widespread—were paid for under the contracts here involved at straight time rates. C. The contemporaneous acts of the same negotiating committees which negotiated the General Cargo Agreement in deliberately-providing different treatment where true shifts and not overtime was involved, show that the contractual overtime rate was a true overtime rate, and therefore not the regular rate.

The question of whether a given rate is a shift differential over the regular rates is a question of fact. In resolving this question the customs of the industry, the manner in which its special problems are treated, and the intent of the parties to a collective agreement setting rates, should be determinative.

As a matter of fact, there are shifts in the longshore industry—and when there are, they have always been treated as such, and overtime rates for such shifts have not been imposed. For example, as far back as 1902, at the Great Lakes Docks, when the overtime scale was time and one-half and more, some of the agreements on the Lakes provided for the working of night shifts with either no shift differential at all, or a very small one. The 1902 agreement for the coal shovellers at Lake Erie Docks, contains a clause that overtime should be worked at all docks when required by the superintendent, but also carries this provision: "That at all ports where the business of the dock is greater than the day gang can handle, double shifts can be worked at the regular scale of wages for day work."

An agreement made in 1902 with an individual company for coal handling at Escanaba, Michigan, while stipulating that the "double shift [is] to be put on only when necessary", added that "in the event of itabeing necessary to put on a double shift or night gang, the men are to be paid 55 cents or 5 cents an hour more than the day rate.

^{30.} Proceedings, I.L.A., 1902, p. 41.

^{31.} Proceedings, I.L.A., 1902, p. 57.

This difference in the treatment of true shifts, as contrasted with overtime, continued right to the date of the agreement in question in these cases—and still continues, for that matter. Under the system of collective bargaining which prevailed, the negotiating committee for the I.L.A. and the employers negotiated and concluded eight different agreements dealing with different crafts. (See booklet, "Agreements negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of Greater New York and Vicinity, effective October 1, 1943", which forms a part of Defendants' Exhibit A.)

One of the agreements negotiated by the negotiating committees of the union and the employers simultaneously with the General Cargo Agreement in question in these cases, was the Port Watchmen's Agreement. The Port Watchmen are organized in a local of the LLA. Unlike the services of the workers covered by the General Cargo Agreement, the services of these longshore workers are regularly required around the clock. Here, therefore, three shifts were required, and the parties desired to provide for them. Accordingly, they negotiated an agreement—as they had done in previous years—setting up three regular shifts. The parties there used language common to industry, and provided as follows:

"The basic working day shall consist of three shifts of eight (8) hours each, from 8 A.M. to 4 P.M., 4 P.M. to 12 Midnight, and 12 Midnight to 8 A.M. (See page 33 of booklet of Agreements referred to, supra.)

They provided for the same rate of pay for each of the shifts, without any differential in pay whatever, but provided for overtime at time and a half for hours worked

outside the regular shifts, whether such hours were in excess of 40 or not.

The trial court noted this agreement in its Findings of Fact:

"The Collective Agreement for watchmen provides for a 24-hour day, with three eight-hour, shifts." (Record, p. 611)

The parties knew the difference between the branch of work in their industry where shifts were regularly worked, and where there were no shifts.

There is, of course, no element of regularity in night work in the longshore industry of such a nature as would justify calling night work a shift. As the trial court found: "The amount of work which may be available for long-shoremen in the Port of New York, and the time of the day, or the day of the week when said work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week and season to season" (Record, 601), and "the casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique" (Record, 599).

POINT III

The court below further erred in its application to these cases of the pertinent decisions of the Supreme Court.

At the risk of some repetition, we shall discuss this point from two aspects and shall show first, that there was no substantial factual relationship between the

Supreme Court cases relied on by the court below, and second, that the specific vices found by the Supreme Court in those cases are not present in our cases.

A. None of the cases relied on by the court below, have a substantial factual relationship to the instant cases.

In Walling v. Youngerman Reynolds Hardwood Company, 325 U. S. 419, the question involved the method of computing overtime where the workers are paid on a piece rate basis. The wage contract provided for a "regular rate" and a guaranteed piece rate. The Supreme Court found that

"the guaranteed piece rates would yield greater returns on an hourly basis for both regular and overtime work "325 U.S. 419," at page 423

than the overtime rate which would be earned by the workers at one and one-half times the contract regular rate. The rate which was yielded under the guaranteed piece rate was

therefore the regular rate at which the stackers are employed 325 U.S. 419, at page 425.

In our cases no piece rates, guaranteed or otherwise, are involved.

In Walling v. Harnischfeger Corporation, 325 U. S. 427, there was also involved a piece work arrangement. Under the wage agreement there, the employees were each paid a basic hourly rate plus an incentive bonus. The overwhelming majority of the employees, under this arrangement, earned compensation over and above their base pay. These incentive workers frequently worked in excess of

the statutory maximum work week. The Supreme Court found the

"For these extra hours they receive a premium of 50% of the basic hourly rate, which does not reflect the incentive bonuses received." 325 U.S. 427, at page 429.

The court held that these incentive workers

"• clearly receive a greater regular rate than the minimum base rate • "." 325 U.S. 427, at page 431.

But in the instant cases there is no incentive system, there is no regular rate as contrasted with an incentive rate designed to increase production, and there is thus no substantial factual relationship between the *Harnisch-feger* case and the instant cases.

In Walling v. Helmerich & Payne, 323 U. S. 37, the question of a split tour of duty was involved, so that the Supreme Court was led to observe "only in the extremely unlikely case where an employee's tours total more than 80 hours a week, did he become entitled to any pay in addition to the regular tour wages" previously received and further, at page 40, " the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received "". There is no contention in our cases that any rate in controversy is a fictitious rate.

149 Madison Avenue Company v. Asselta, 331 U. S. 199, presents a set of facts which bear no realtion to those in our cases. There is a wide degree of difference as is indicated by the language of the Supreme Court at page 209:

"• • the agreement in this case was one calling for a work week in excess of 40 hours, with-

out effective provision for overtime pay until the employees had completed the scheduled work week, and that the 'hourly rate' derived from the use of the contract formula, was not the 'regular rate' of pay within the meaning of the F.L.S.A.'

In our cases the hourly rates are not derived from any formula or computation. They are clearly set forth in the contract, as are the overtime rates.

Moreover, we respectfully submit that the court below erred in its reading of the Asselta case in its relation to our cases. In its opinion in our cases, the court below, referring to the Asselta case said:

"As recently as May, of this year, the Supreme Court, in a unanimous opinion by Chief Justice Vinson—confirming what had been said previously by this Court and by several other inferior courts—decided that the Belo case doctrine must be limited to agreements which contained a 'provision for a guaranteed weekly wage with a stipulation of an hourly rate', and that other types of agreement, whether or not a result of collective bargaining cannot, by their terms, determine what is the 'regular rate' named in the Act. That 'regular rate', said the court, is an 'actual fact'. See 149 Madison Avenue Company v. Asselta, — U. S. — (May 5, 1947)". Reported at 162 F. 2d 665.

We do not so read the Asselta case. We respectfully submit that the court below gave to the words of the Supreme Court a meaning which is not warranted by the context of the Belo case and the Asselta case, read together.

In any event, the straight time hourly rates set forth in the agreement in our cases, were in fact the regular rates, as they had been for many years prior to the enactment of F.L.S.A., and the overtime rates set forth in the agreement were, in fact, the true overtime rates as they had been for many years past.

Overnight Motor Transportation Company v. Missel, 316 a. U. S. 572, presented a situation where the employees worked irregular hours at a fixed weekly wage and the question was one of computing their hourly rate from their weekly rate. But in our case, no such computation is involved, since the hourly rates are specified.

The court below apparently gave some weight to Cabunac v. National Terminals Corporation, 139. F. 2d 853 (C.C.A. 7) (Record, 657-658). But in the Cabunac case there were two issues involved-one, the validity of a 1,000 hour exemption clause under Section 7B of the F.L.S.A. and second, the sufficiency of overtime provisions of a labor agreement. The court held that the 1,000 hour clause did not constitute an allowed exemption from the overtime provisions of the Act. Moreover, the language of the Seventh Circuit Court in the Cabunac decision with respect to the sufficiency of the overtime provisions referred to a situation where the differential between the regular rate and the so-called overtime rate was 17 percent-only 10 cents per hour. The court's opinion there, therefore, says that "it seems evident to us as it did to the District Court, that the 'overtime' rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workmen's standpoint, and that this rate is the 'regulair rate' to be paid for work on the night shift". This would appear to be a case of a shift differential and sheds no light on a situation such as ours where the difference between the day rate and the night rate was 50 percent, and where the trial judge found . as a fact that there is a vast difference between a shift differential and a 50 percent overtime premium (Records 605, 606).

B. The vices which the Supreme Court found in the overtime wage arrangements in the cases relied on by the court below are not present in the instant cases.

In the Youngerman Reynolds case, 325 U. S. 419 at page 425, the Supreme Court found that the "regular rate" fixed by the contracts there in question "is never actually paid". In our cases the regular rate fixed by the contracts is an actual rate, which is paid for every hour of work during the basic work day. And, similarly, the regular rate in our cases is not an "artificial rate", as the "regular rate" in the Youngerman Reynolds case was found to be by the Supreme Court at page 425.

In the Harnischfeger case, 325 U.S. 27, at page 431, the Supreme Court found that

"a full 50% increase in labor costs and a full 50% wage premium are impossible of achievement under such a computation."

Certainly a full 50% increase in labor costs and a full 50% wage premium are achieved in our cases, in the light of the fact, as found by the trial court, that during the peacetime years from 1932 to 1937, 79.93 percent of the total number of hours worked were within the basic working day as defined by the Collective Agreement; for the 10 months between the effective date of F.L.S.A. and August 31, 1939, shortly before the outbreak of the war, the corresponding percentage was 75.03 percent (Record, p. 606), and that even during the last full year of war eperience, the corresponding figure was 54.5 percent (Record, p. 607). Since all hours outside the basic working day carried a 50% premium all the longshore workers, including the respondents, not only received a 50% premium after 40 hours of work if they were performed

during the basic working day, but even before 40 hours of work, if they performed less than 40 hours of work during the basic working day and one or more hours outside the basic working day.

In the Helmerich & Payne case, the Supreme Court held that

"the vice of respondents' plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-over time hours." It was derived not from the actual hours and wages but from ingenious mathematical manipulations. "." 323 U.S. at page 41.

In our cases the regular rate was actually paid—it was not dependent on any type of mathematical manipulation.

In the Asselta case the Supreme Court found that no adequate provision was made for overtime compensation until employees regularly hired as watchmen had worked a total of 54 hours in one week and until other regular employees had worked a total of 46 hours. 231 U.S. at pages 204-5. In our cases provision is made for payment of overtime, not only after, but before 40 hours.

In the Overnight Transportation Co., Inc. case the Supreme Court found that

"there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage." 316 U.S. at page 581.

In our cases the absolute limit for contractual straight time pay was 40 hours.

And in summary, it may be said that each of the cases relied on by the court below dealt with either a situation where there was a taint of attempted evasion of the F.L.S.A., or with overtime compensation arrangements which were entered into after the Act went into effect and which were astutely devised to retain prior rates of pay.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

International Longshoremens Association,
Amicus Curiae,
Louis Waldman, Counsel.

Louis Waldman, Charles H. Green, Of Counsel.

Affidavit of Mailing

State of New York (SS.

Before me the undersigned authority for said County in said State personally appeared VINCENT F. O'HARA who, being by me first duly sworn stated on oath that on this day of December, 1947, he deposited in the United States mail copies of the foregoing Motion and Brief correctly addressed to Philip B. Perlman, Solicitor General, Department of Justice, Washington 25, D. C., counsel for the Petitioner, and to Max R. Simon, Esq., 225 West 34th Street, New York City and to Goldwater & Flynn, Esqs., 50 East 42nd Street, New York City, attorneys for Plaintiffs-Respondents.

VINCENT F. O'HARA,

Sworn to and subscribed before me this a day of December, 1947.

JACOB GOLDSMITH

Attorney and Counsellor-at-Law of the State of New York Office & P. O. Add: 305 B way, N. Y. 7, N. Y. Residing in Queens County

> Kings Co. Clk. No. 23, N. Y. Co. Clk. No. 58 Commission Expires March 30, 1948



SUPREME COURT OF THE UNITED STATES

Nos. 366-367.—OCTOBER TERM, 1947.

Bay Ridge Operating Co., Inc., Petitioner,

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James Aaron, Albert Alston, James Philip Brooks, et al.

> Huron Stevedoring Corp., Petitioner,

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Leo Blue, Nathaniel Dixon, Christian Elliott, et al. On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 7, 1948.]

MR. JUSTICE REED delivered the opinion of the Court ...

These cases present another aspect of the perplexing problem of what constitutes the regular rate of pay which the Fair Labor Standards Act requires to be used in computing the proper payment for work in excess of forty hours. The applicable provisions read as follows:

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(3) for a workweek longer than forty hours . after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

¹⁵² Stat. 1060, 1063, approved June 25, 1938; § 7 (a) took effect 120 days later, § 7 (d). No problem as to the length of time any

The problem posed is the method of computing the regular rate of pay for longshoremen who work in foreign and interstate commerce varying and irregular hours throughout the workweek under a collective bargaining agreement for handling cargo which provides contract straight time hourly rates for work done within a prescribed 44-hour time schedule and contract overtime rates for all work done outside the straight time hours.²

These two suits were brought as class actions on behalf of all longshoremen employed by two stevedoring companies, Bay Ridge Operating Co., and Huron Stevedoring Corp.; to recover unpaid statutory excess compensation

employee worked is presented. See Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590; Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680., Portal to Portal Act of 1947, 61 Stat. 84.

The use of the word "overtime" in the contract does not decide this case. The problem for solution is whether rates described as "overtime" by the contract actually are such rates as § 7 (a) provides

for statutory excess hours.

As will hereafter appear, we consider the contract as intending to provide statutory excess compensation and overtime premium. Consequently, we accept the word "overtime" used in the contract to describe one wage scale as having been intended by the parties to the contract to satisfy fully the requirements of § 7. (a).

The following phrases are used in this opinion with the following

meaning. These definitions do not apply to quotations.

Extra pay.—Any increased differential from a lower pay scale for work after a certain number of hours in a workday or workweek or for work at specified hours.

Overtime premium.—Extra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute.

Statutory excess compensation—Additional compensation required to be paid by § 7 (\$), F. L. S. A.

Regular rate of pay.—Total compensation for hours worked during any workweek less overtime premium divided by total number of hours worked.

The following definitions apply to the circumstances of this contract only:

Contract straight time.—Compensation paid under the longshoring

in accordance with § 16 (b) of the Fair Labor Standards Act. By stipulation the claims of ten specific longshoremen in each case were severed and the two suits were consolidated for trial, leaving the claims of the other plaintiffs pending on the docket. The claims of the plaintiffs here are for the period October 1, 1943, to September 30, 1945.

The terms of employment for the respondents longshoremen working in the Port of New York, were fixed for the period in question by the collective bargaining agreement between the International Longshoremens Association and the New York Shipping Association together with certain steamship and stevedore companies. It was applicable to the two petitioners. The agreement established a "basic working day" of eight hours and a "basic working week," that is, workweek, of forty-four hours: hourly rates for different types of cargo were specified for work between 8 a, m. and 12 noon and between 1 p. m. and 5 p. m. during five working days of the week. Monday through Friday, and from 8 a. m. to 12 noon on Saturday, and a different schedule of rates for work during all other hours in the workweek. The first schedule was called "straight time" rates, and the second schedule was entitled

contract for work during the hours defined in par. 3 (a) of the contract, as follows: 8 a. m. to 12 noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 noon Saturday.

Contract overtime.—Additional compensation which the contract requires shall be paid for work on legal holidays and for work at hours other than those specified in par. 3 (a).

^{4 52} Stat. 1069, § 16:

[&]quot;(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation; as the case may be, and in an additional equal amount as liquidated damages. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

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"overtime" rates. This opinion designates these rates as contract straight time and contract overtime. For four types of cargo the overtime rates were exactly one and a half times the straight time rates; for four other types the overtime rates were slightly less than one and a half times the straight time rates. The contract straight time rates ranged from \$1.25 to \$2.50 an hour. The contract overtime rates were paid for all work on Sundays and legal holidays. The contract provided for no differential for work in excess of forty hours in a week."

I. General Cargo Agreement.

"1. Members of the party of the second part shall have all of the work pertaining to the rigging up of ships and the coaling of same, and the discharging and loading of all cargoes including mail, ships' stores and baggage. When the party of the second part cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the party of the first part may employ such other men as are available.

"2. (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

"(b) Meal hours shall be from 6 A. M. to 7 A. M., from 12 Noon to 1 P. M., from 6 P. M. to 7 P. M., and from 12 Midnight to 1 A. M.

"(c) Legal Holidays shall be: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday on the New Jersey Shore, Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving, Christmas, and such other National or State Holidays as may be proclaimed by Executive authority.

'(b) All other time, including meal hours and the Legal Holidays

The Agreement contains the following provisions with respect to the hours of work and scale of wages:

[&]quot;3. (a) Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 F. M. to 5 P. M., Monday to Friday, inclusive, and from 8 A. M. to 12 Noon Saturday.

Respondents claim that their regular rate of pay under the contract for any workweek, within the meaning of . § 7 (a), is the average hourly rate computed by dividing the total number of hours worked in any workweek for any single employer into the total compensation received from that employer during that week; and that in those workweeks in which they worked more than forty hours for any one employer they were entitled by § 7 (a) to statutory excess compensation for all such excess hours computed on the basis of that rate. The petitioners claim that the straight time rates are the regular rates, and that they have, therefore, with minor exceptions not presented by this review, complied with the requirements of 7 (a). That is, no rates except straight time rates are to be taken into consideration in computing the regular rate. The petitioners contend that the contract overtime rates were intended to cover any earned statutory excess compensation and did cover it because they were substantially in an amount of one and one-half times the straight time

specified herein, shall be considered overtime and shall be paid for at the overtime rate.

Straight
Time Overtime
Hofirly Hourly
Rate Rate

Extra rates are paid for special types of cargo.

For example:

[&]quot;(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the men are relieved.

[&]quot;4. Wage Scale: The wage scale shall be as follows: ...

[&]quot;(d) Wet hides, creosoted poles, creosoted ties,"
creosoted shingles and soda ash in bags... \$1.40 \$2.02\\\2"

rates. The District Court held that the contract straight time rates were the regular rates but the Circuit Court of Appeals for the Second Circuit held otherwise.

Throughout all these proceedings the petitioners have been represented by the Department of Justice, since the United States under its cost-plus contracts with the petitioners is the real party in interest. Substantially all stevedoring during the war years was performed for the account of the United States. The Solicitor General notes that prior to the decision in the Circuit Court of Appeals, 118 suits had been instituted on behalf of longshoremen, and since that time approximately 100 new complaints have been filed. Contracts of the same general type are said to have been in effect in all our maritime Witnesses testifying before the Wages and Hours Subcommittee of the House Committee on Education and Labor stated that liability of the Government under such suits would be large. The Wage and Hour Administrator has not filed a brief in the proceedings, but the Solicitor General has advised us that the Administrator of the Wage and Hour Division of the Department of

⁶ Addison v. Huron Stevedoring Corp., 69 F. Supp. 956; Aaron v. Bay Ridge Operating Co., 162 F. 2d 665.

⁷Mr. Walter E. Maloney, representing the National Federation of American Shipping, testified that liability to the Government on stevedoring contracts might run as high as \$260,000,000, although he admitted that the amount of liability was "almost impossible to calculate." 'Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 1198-1205. Committee members referred to the amounts in question as \$236,000,000, \$340,000,000, and \$300,000,000. Hearings, supra, pp. 1203, 2283, 2469. The basis for such figures does not appear. Nor is it made clear whether the Portal to Portal Act was in mind. 61 Stat. 84, Pt. IV, §§ 9 and 11.

The International Longshoremens Association claims to have approximately 80,000 members in United States and Canada. Thirty thousand are said to work in the Port of New York, and the terms adopted in the New York contract are generally followed in other

Labor "believes that proper consideration was given by the court below to his interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct." The Administrator and the Solicitor of the Department of Labor testified at length before the House committee as to their views on the issues presented by these cases. Amicus briefs have been filed by the International Longshoremens Association, the National Association of Manufacturers, and the Waterfront Employers Association of the Pacific Coast, all urging that the decision below be reversed.

In order to fix the legal issues in their factual setting, we summarize the findings of fact made by the District Court which were accepted by the Circuit Court of Appeals and are not challenged here. Most of these findings referred to in this opinion will be found in the Appendix at 162 F. 2d 670. Employment in the longshore industry has always been casual in nature. The amount of work available depends on the number of ships in port and their length of stay and is consequently highly variable and unpredictable, from day to day, week to week, and season to season. Longshoremen are hired for a specific job at the "shape," which is normally

ports. The Waterfront Employers Association of the Pacific Coast states that 20,000 stevedores are covered by 21 collective bargaining contracts, of which 3 are with the International Longshoremen's and Warehousemen's Union. The current New York contract with the I. L. A. and the 21 agreements between the Pacific Association and the I. L. A. and I. L. W. U. are said to contain clauses permitting cancellation if the courts sustain the claims of plaintiffs in this suit.

⁸ Hearings, supra, note 7, 2467-2471; 2474-2482; 2736-2762.

The trial court gave the following explanation of the "shape," Finding 16:

[&]quot;At three stated hours during the day, namely at 7.55 a. m., 12.55 p. m., and 6.55 p. m., men seeking employment gather in a group or semicircle, constituting the 'shape,' at the head of a pier where work is available. The foreman stevedore then selects from

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held three times a day at each pier where work is available. The hiring stevedore selects the men he desires from the longshoremen who are present at the "shape"; in some instances a group of longshoremen are hired together as a gang. The work may last only for a few hours or for as long as a week. Although some work is carried on at all hours, the stevedoring companies, since operations are then carried on at less cost, attempt to do as much work as possible during the straight time hours.

The court further found that the rate for night work and holiday work had been higher than the rate for day work since at least as far back as 1887, and that since 1916, when the first agreement was made with the International Longshoremens Association, the differential had been approximately 50%. Joseph B. Ryan, President of the Association, testified that the differential was designed to shorten the total number of hours worked and to confine the work as far as possible within the scheduled forty-four hours. Despite the differential, many longshoremen were unwilling to work at night. Although some long-shore work was required at all hours, except Saturday night, the District Court found that the differential had been responsible for the high degree of concentration of longshore work to the contracts aight time hours.

The government introduced elaborate statistical studies to show the distribution of work as between the contract straight time and contract overtime hours. From 1932 to 1937, 80% of the total hours worked were within the contract straight time hours and only $2\frac{1}{2}$ %

the 'shape' such men as he desires to hire, to work until 'knocked off', that is, told to quit. The selection of a man from the shape carries with it no obligation on the part of the employer concerning any specified length of employment, except for work requirements of the Collective Agreement relating to minimum hours under specified conditions. The duration of employment depends entirely upon the determination of the stevedore or the steamship company."

of the total manhours were performed by men working between 5 p. m. and 8 a. m. (exclusive of Sundays and holidays) who had worked no straight time hours earlier that day. During the war, the proportion of work in contract overtime hours was considerably higher because of the greater volume of cargo handled; 55% of the total hours fell within the contract straight time hours, and the ratio of work in contract overtime hours by men who had not previously worked in the contract straight time hours was correspondingly higher. The respondents' employment was highly irregular; in many weeks the respondents did not work at all, and in weeks in which they did work their hours of employment varied over a wide range. The trial court concluded that the "basic working day" and "basic working week," 10 meaning by these phrases the contract straight time hours, were not the periods "normally, regularly, or usually" worked by the respondents. Finding 45.

In giving judgment for the petitioners, the trial court placed emphasis on the fact that the rates in question were arrived at through bona fide collective bargaining, and were more favorable to the longshoremen than the statutory mandate required. That is, that rates as high as contract straight time rates plus statutory excess compensation were paid to all workers for all work in contract overtime hours whether required by § 7 (a) or not. The District Court opinion referred to Joseph B. Ryan's statement that the International Longshoremens Association was opposed to the suit "as it might wipe out all of the

The trial court found, Finding 13, that "The work week commenced on Monday at 7 a. m. and ended the following Monday at 7 a. m." The 44-hour week had been in the contracts between the Shipping Association and the Longshoremens Association prior to the Fair Labor Standards Act. No adjustment of the basic workweek was made in the contract when the 42- and 40-hour provisions of § 7 (a) became effective.

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gains we had made for our men over a period of 25 years." It rejected respondents' alternative contentions that the regular rate was to be determined by the average rate during the first forty hours or by the average rate for all hours worked. It noted that shift differentials were usually five or ten cents an hour and seldom exceeded fifteen cents and were not designed to deter the employer from working employees during the period for which the differential was paid; in the present case the trial judge found that the 50% differential was designed to deter and actually did deter work outside contract straight time hours. Accordingly the trial court concluded that the "collectively bargained agreement established a regular rate" under the Fair Labor Standards Act—the contract straight time rate. 69 F. Supp. 956.

The Circuit Court of Appeals held that the regular rate must be determined as an "actual fact" and could

objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. Before there was any union we had double time for Sunday. We wanted to work in the daytime. We figured we only live once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steamship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry, when they found it too expensive to do it in any other way, have been done.

[&]quot;Q. Do the men object to working outside of a normal day?—A. Absolutely."

Furthermore, as the Longshoremens Association's primary interest is as stated above by Mr. Ryan, it fears the effect on their employment contract of a holding that the contract overtime rate must be used in the determination of statutory excess compensation. The Shipping Association might insist on a reduction of the contract overtime rate, if payment of that rate were not to be treated as a satisfaction of the statutory requirements.

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ment, citing 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199. That court therefore concluded that on the basis of the findings below the regular rate must be computed by dividing the total number of hours worked into the total compensation received. The court rejected the contention that the regular rate was the average rate for the first forty hours of work, citing Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17. The judgment of the District Court was reversed with directions to determine the amounts due plaintiffs in the light of the Portal to Portal Act of 1947, 61 Stat. 84. No determination of the scope or validity of that act was attempted as those matters had not been argued. 162 F. 2d 673.

On account of the importance of the method of computing the regular rate of pay in employment contracts providing for extra pay, we granted certiorari.12—

The government adopts the view of the District Court that the contract straight time rates constituted the regular rates within the meaning of \$7 (a) of the Fair Labor Standards Act. The government accepts, too, the reasoning of the District Court that the contract overtime rates, as they were coercive in the sense that they were intended to exert pressure on employers to carry on their activities in the straight time hours, were not regular rates and could be credited against required statutory excess compensation in the amount that the contract overtime rates exceeded the contract straight time rates. government argues in the alternative that the "normal. non-overtime workweek." said to be the hours controlling the regular rate of pay, is to be determined by reference to peacetime conditions, rather than the abnormal wartime conditions, and that the statistical studies show that

¹² See note 7, supra.

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the work of longshoremen is sufficiently concentrated within the scheduled hours to compel the finding that the contract straight time hours are the regular working hours. The government urges also that the contract, as thus interpreted, accords with congressional purposes in enacting the Fair Labor Standards Act. It is said to reduce working hours and spread employment and to preserve the integrity of collective bargaining.

We agree with the conclusion reached by the Circuit Court of Appeals. Later in this opinion, pp. 17-23, we set out our reasons for concluding that the extra pay for contract overtime hours is not an overtime premium. Where there are no overtime premium payments the rule for determining the regular rate of pay is to divide the wages actually paid by the hours actually worked in any workweek and adjudge additional payment to each individual on that basis for time in excess of forty hours worked for a single employer. Any statutory excess compensation so found is of course subject to enlargement under the provisions of § 16 (b). Compare § 11 of Portal to Portal Act of 1947. This determination, we think, accords with the statute and the terms of the contract.

Congress "to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum." The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost." The statute by its terms protects the group of employees by protecting each individual employee from overly long hours. So although only one of a thousand

¹³ Overnight Motor Co. v. Missel, 316 U S. 572, 577, 578; Walling v. Helmerich & Payne, 323 U. S. 37, 40; Brooklyn Bank v. O'Neil, 324 U. S. 697, 796; Jewell Ridge Corp. v. Local, 325 U. S. 161, 167.

works more than forty hours, that one is entitled to statutory excess compensation. That excess compensation is fixed by § 7 (a) "at one and one-half times the regular rate at which he is employed." The regular rate of pay of the respondents under this contract must therefore be found.

The statute contains no definition of regular rate of pay and no rule for its determination. Contracts for pay take many forms. The rate of pay may be by the hour, by piecework, by the week month or year, and with or without a guarantee that earnings for a period of time shall be at least a stated sum. The regular rate may vary from week to week. Overnight Motor Co. v. Missel, 316 U. S. 572, 580; Walling v. Belo Corp., 316 U. S. 624, 632. The employee's hours may be regular or irregular. From all such wages the regular hourly rate must be extracted. As no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency.

Every contract of employment, written or oral, explicitly or implicitly includes a regular rate of pay for the person employed. Walling v. Belo Corp., supra, 631; Walling v. Halliburton Oil Well Cementing Co., supra. We have said that "the words regular rate"... obviously mean the hourly rate actually paid for the normal, non-overtime workweek." Walling v. Helmerich & Payne, 323 U. S. 37, 40. See United States v. Rosenwasser, 323 U. S. 360, 363. "Wage divided by hours equals regular rate." Overnight Motor Co. v. Missel, supra, 580. "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive

¹⁴ Kirschbaum Co. v. Walling, 316 U. S. 517, 523; see § 9, Part IV, Portal to Portal Act, 61 Stat. 84.

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of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 424-25. The result is an "actual fact." 149 Madison Ave. Corp. v. Asselta, supra, 204.

In dealing with such a complex situation as wages throughout national industry. Congress necessarily had to rely upon judicial or administrative application of its standards in applying sanctions to individual situations. These standards had to be expressed in words of generality. The possible contract variations were unforeseeable. In Walling v. Belo Corp., supra, 634, this Court refrained from rigidly defining "regular rate" in a guaranteed weekly wage contract that met the statutory requirements of § 7 (a) for minimum compensation. In the Belo case the contract called for a regular of basic rate of pay above the statutory minimum and a guaranteed weekly wage of 60 times that amount. As the hourly rate was kept low in relation to the guaranteed wage, statutory overtime plus the contract hourly rate did not amount to the guaranteed weekly wage until after 541/2 hours were worked. P. 628. We refused to require division of the weekly wage actually paid by the hours actually worked to find the "regular rate" of pay and left its determination to agreement of the parties. Where the same type of guaranteed weekly wages were involved, we have reaffirmed that decision. as a narrow precedent principally because of public reliance upon and congressional acceptance of the rule there announced. Walling v. Halliburton Co., supra. . Aside from this limitation of Belo, the case itself is not a precedent for these cases as in Belo the statutory requirements of minimum wages and statutory excess compensation were provided by the Belo contract. In these present cases no provision has been made for any statutory excess compensation and none can be earned by any respondent based on the contract overtime pay. Our assent to the Belo decision, moreover, does not imply that mere words in a contract can fix the regular rate.15 That would not be the maintenance of a flexible definition of regular rate but a refusal to apply a statutory requirement for protecting workers against excessive hours. The results on the individual of the operations under the contract must be tested by the statute.16 As Congress left the regular rate of pay undefined, we feel sure the purpose was to require judicial determination as to whether in fact an employee receives the full statutory excess compensation, rather than to impose a rule that in the absence of fraud or clear evasion employers and employees might fix a regular rate without regard to hours worked or sums actually received as pay.

Further, we reject the argument that under the statute, an agreement reached or administered through collective bargaining is more persuasive in defining regular rate than individual contracts. Although our public policy recognizes the effectiveness of collective bargaining and encourages its use," nothing to our knowledge in any act authorizes us to give decisive weight to contract declara-

^{18 149} Madison Ave. Corp. v. Asselta, supra, p. 204: "The crucial questions in this case, however, are whether the hourly rate derived from the formula here presented was, in fact, the 'regular rate' of pay within the statutory meaning and whether the wage agreement under consideration, in fact, made adequate provision for overtime compensation." Walling v. Harnischfeger Corp., 325 U. S. 427, 432.

Walling v. Youngerman-Reynolds Hardwood Co., supra, 424; Walling v. Harnischfeger Corp., supra, 430.

National Labor Relations Act 49 Stat. 449; Labor Management Relations Act of 1947, 61 Stat. 136; Norris-LaGuardia Act, 47 Stat. 70, § 2; Portal to Portal Act of 1947, 61 Stat. 84, § 1.

tions as to the regular rate because they are the result of collective bargaining. 149 Madison Ave. Corp. v. Asselta, supra, 202 and 204; Walling v. Harnischfeger Corp., 325 U. S. 427, 432. A vigorous argument is presented for petitioners by the International Longshoremens Association that a collectively obtained and administered agreement should be effective in determining the regular rate of pay 15 but we think the words of and practices under the contract are the determinative factors in finding the regular rate for each individual.

As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract. We think the most reasonable conclusion is that Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked unless the compensation paid to the employee contains some amount that represents an overtime premium. If such overtime premium is included in the weekly pay check that must be deducted before the division. This deduction of overtime premium from the pay for the workweek results from the language

[&]quot;Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live." 69 F. Supp. 956, 959.

[&]quot;Collective bargaining, to be effective, must necessarily deal with large groups—with all the workers in the industry, or its subdivision, on whose behalf the bargaining is being conducted. And when, as in the I. L. A., such collective agreements are submitted to a vote of the membership affected, and that approval of the bargain thus arrived at is voted, it would make of collective bargaining a mockery if some of them could seek special terms, because, for a short period of time, their work experience has varied in some degree from that of their fellow workers."

of the statute. When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay. To permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium a pyramiding that Congress could not have intended. In order to avoid a similar double payment, we think that any overtime premium paid, even if for work during the first forty hours of the workweek, may be credited against any obligation to pay statutory excess compensation. These conclusions accord with those of the Administrator.

The definition of overtime premium thus becomes crucial in determining the regular rate of pay. We need not pause to differentiate the situations that have been described by the word "overtime." " Sometimes it is used to denote work after regular hours, sometimes work after hours fixed by contract at less than the statutory maximum hours and sometimes hours outside of a specified clock pattern without regard to whether previous work has been done, e. g., work on Sundays or holidays. It is not a word of art. See Premium Pay Provisions in Union Agreements, Monthly Labor Review, United States Department of Labor, October 1947, Vol. 65, No. 4, Overtime premium has been used in this opinion as defined in note 3. It is that extra pay for work because of

See note 30 and Walling v. Youngerman-Reynolds Hardwood Co., supra, 424-25.

[&]quot; Cf. Finding 28 (a): "Prior to the Fair Labor Standards Act, the word overtime had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an indispensable element of the concept of overtime as understood. Overtime was also understood to cover hours outside of a specified clock pattern."

previous work for a specified number of hours in the workweek or workday. It is extra pay of that kind which we think that Congress intended should be excluded from computation of regular pay. Otherwise the purpose of the statute to require payment to an employee for excess hours is expanded extravagantly by computing regular rate of pay upon a payment already made for the same purpose for which § 7(a) requires extra pay, to wit, extra pay because of excess working hours. Accordingly, statutory excess compensation paid for work in excess of forty hours should not be used to figure the regular rate. Neither should similar contract excess compensation for work because of prior work be used in such a calculation. Extra pay by contract because of longer hours than the standard fixed by the contract for the day or week has the same purpose as statutory excess compensation and must likewise be excluded.22 Under the definition, a mere higher

The holding in Walling v. Helmerich & Payne, supra, is not to, the contrary of this position. The facts of that case indicated a palpable evasion of the statutory purposes. See 69 F. Supp. at p. 958, note 1.

Nor is the decision in 149 Madison Ave. Corp. v. Asselta, supra, opposed to this position. In that case weekly wage contracts calling for a workweek of 46 and 54 hours provided the following formula for determining the regular hourly rate of pay: "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of forty (40) hours." 331 U.S. at 202. Under that method of computation an employee who worked 46 hours received a sum equal to what he would have received if he had been paid for 40 hours' work at the formula hourly rate and 6 hours of work at one and a half times the formula fate. As so construed, the extra pay for work in excess of 40 hours would be an overtime premium which could be excluded from the computation of the regular rate; and the regular rate would be the formula rate. The Court did not reach the question of the legality of that method of computation as it held that since the formula rate was not consistently employed in determining compensation, the formula rate could not be

rate paid as a job differential or as a shift differential, or for Sunday or holiday work, is not an overtime premium. It is immaterial in determining the character of the extra pay that an employee actually has worked at a lower rate earlier in the workweek prior to the receipt of the higher rate. The higher rate must be paid because of the hours previously worked for the extra pay to be an overtime premium.

The trial court refused to accept the respondents' contention that the contract overtime rate was a shift differential, partly because it was felt that such a holding would have a disruptive effect on national economy. 69 F. Supp. 958-59. We use as examples three illustrations employed by the District Court to illustrate its understanding of the effect of respondents' contentions to employment situations. That court thought these illustrations indicated additional liability from the employer under § 7 (a).24 We do not agree. Our conclusions as

considered the regular rate for those who worked more than 40 hours. Accordingly the regular rate was held to be the average of all wages actually paid during the entire week. See Asselta v. 149 Madison Ave. Corp., 156 F. 2d 139, 141.

23 The opinion stated:

"This controversy requires for its resolution a delicate adjustment to accommodate the harmonious application of three national policies. A heavy handed meshing of these three policies with the industrial machine which fails to minimize the friction at their points of contact can generate enough heat to impair one or more of the policies or severely injure the machine itself.

"In chronological order we have (1) the National Labor Relations Act, July 5, 1935, 49 Stat. 449, ... to encourage the practice of collective bargaining; (2) the Fair Labor Standards Act, June 25, 1938, 52 Stat. 1060, ... to correct and eliminate the labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers; (3) the national need during the war for the maximum of production as illustrated by Executive Order 9301, February 9, 1943, 8 Fed. Reg. 1825, establishing the 48 hour week for the duration of the war."

to the trial court's illustrations vary from those of the trial court because that court did not deduct overtime premiums, as we have defined them, actually paid from the weekly wage before dividing by the hours worked. See quotation from Walling v. Youngerman-Reynolds Hardwood Co., supra, at p. 14 of this opinion. employment contract calls for an overtime premium for work beyond thirty-six hours. Such extra pay should not be included as weekly wages in any computation of the regular rate at which a man works." (2) A contract provides for payment of time and a half for work in excess of eight hours in a single workday. An employee who works five ten-hour days would have no claim for statutory excess compensation if paid the amount due by the contract." Or (3) a contract provides for a rate of \$1 an hour for the first 40 hours and \$1.50 for all excess hours; an employee works 48 hours and receives \$52. To find his regular rate of employment, the overtime premium of \$4 should be deducted and the resulting sum divided by 48 hours." On the other hand, a man might be employed as a night watchman on an eight-hour shift at time and a half the wage rate of day watchmen. This would be extra pay for undesirable hours. It is a shift differential. It would not be overtime premium

^{\$1.50=}total wages \$57. Regular rate=\$57, less overtime premium of \$7, +50 hours=\$1 per hour.

^{25 5} days×8 hours at \$1 per hour+5 days×2 hours at \$1.50 per hour=\$55 total wage. Regular rate=\$55-\$5 +50=\$1 per hour.

²⁶ Executive Order 9301, issued February 9, 1943, 8 F. R. 1825, provided that all government contractors should work their employees at least 48 hours per week. The Order provided that it should not be construed as superseding the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor as suspending or modifying any provision of the Fair Labor Standards Act or any other law relating to the payment of wages or overtime.

pay but would be included in the computation for determining overtime premium for any excess hours."

Where an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor rather than an overtime premium." Such payments enter into the determination of the regular rate of pay. See Cabunac v. National Terminals Corp., 139 F. 2d 853.

The trial court seemed to assume that if the contract overtime rate were a shift differential, the employee who worked on a higher paid shift would be entitled to have his higher shift rates enter into the computation of regular rate of pay. One of the reasons for not allowing the

GENERAL CARGO

From	To	Work Days	Holidays
7 A. M.	12 M. D	. \$0.55	\$0.77
12 M. D.	1 P. M	0.90	1.00
1 P. M.	4 P. M	. 0.55	0.77
4 P. M.	6 P. M	. 0.77	0.84
6 P. M.	7 P. M	. 0.90	1.20
7 P. M.	11 P. M	0.77	0.84
11 P. M.	12 M. N	. 0,90	1.25
12 M. N.	. 6 A. M	. 0.84	1.02
6 A. M.	7 A. M	. 1.30	1.40

[&]quot;For example, daytime watchman's pay, \$.60 per hour. Nighttime watchman's pay \$.90 per hour, eight-hour, seven-day shift. Sixteen hours would be compensated for at excess time rates. The watchman's pay would be 56×\$.90=\$50.40. His statutory excess pay 16×\$.45=\$7.20; total \$57.60. His regular rate is (\$57.60-\$7.20) +56 or \$.90 per hour.

Compare Legal Field Letter 109, Office of the Solicitor, Department of Labor, July 31, 1946, 1947 Wage-Hour Man, 66, in which the Chief of the Wage-Hour Section characterizes a particular 50% differential as a shift differential.

[&]quot;This is well brought out by a case similar in character to this litigation. Ferrer v. Waterman S. S. Corp., 70 F. Supp. 1. There the wage schedule was as follows, p. 3:

contract overtime rates in the computation of regular rate of pay was that it thought the great difference between the contract straight time and contract overtime rates showed that the premium paid by contract was not a shift differential but a true overtime premium. In this we think the trial court erred. The size of the shift differential cannot change the fact that large wages were paid for work in undesirable hours. It is like a differential for dangerous work. This contract called for \$2.50 straight time hourly rate for handling explosives. The statutory excess compensation would, of course, be \$3.75 per hour. If an employee receives from his employer a high hourly rate of pay for hard or disagreeable duty, he is entitled to the statutory excess compensation figured on his actual pay.

Nor do we find the District Court's reliance upon the fact that the overtime rates were employed in order to concentrate the work of the longshoremen in the straight time hours relevant to a determination of the respondents' rate of pay. The District Court thought the concentration was significant. It did not test whether the contract overtime rates contained overtime premium payments by considering whether the employee actually received extra compensation for excess hours. We accept the District Court's holding that this concentration was an intended effect of the overtime rates and that the higher rates did contribute to the concentration of the work in the straight time hours as set out in a preceding paragraph of this opinion. P. 9 supra. Such a concentration tends, in some respects, to the employment of more men, as there is pressure for more work to be done in the straight time hours. Overnight Motor Co. v. Missel, supra, 578. However, the pressure of the contract overtime wages is not solely toward a spread of employment. Since work is in fact done outside straight time hours, the employer can use men who have previously worked in straight time

hours in contract overtime hours without additional cost.

But spread of employment is not the sole purpose of the forty-hour maximum provision of § 7 (a). Its purpose is also to compensate an employee in a specific manner for the strain of working longer than forty hours. Overnight Motor Co. v. Missel, supra, 578. The statute commands that an employee receive time and one-half his regular rate of pay for statutory excess compensation. The contract here in question fails to give that compensation to an employee who works all or part of his time in the less desirable contract overtime hours. Looked at from the individual standpoint of respondents, the concentration of work does not have any effect upon their regular rate of pay. Because of this defect, the concentration of work brought about by the contract has no effect in the determination of the regular rate of pay. As we indicated at the beginning of this subdivision (1) a major purpose of the statute was to compensate an employee by extra pay for work done in excess of the statutory maximum hours. Thus the burdens of overly long hours are balanced by the pay of time and a half for the excess hours.

We therefore hold that overtime premium, deductible from extra pay to find the regular rate of pay, is any additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute.29

²⁹ We avoid any extended discussion of respondents' suggestion that the proper way to determine the regular rate is to divide the wages received during the first forty hours of work in a week by 40. The quotient, it is suggested, would be the regular rate. One fault of that method, we think, is that such wages might contain overtime premium payments; for example, a contract which fixed a rate for 36 hours and a higher rate for subsequent hours. Another objection

(2) Since under Interpretative Bulletin No. 4, § 69, the Administrator refers to regular working hours as important in calculating the regular rate of pay under § 7 (a) of the Act, a word must be said as to regular working hours in this case. "Regular working hours" apparently has not been defined by the Administrator. He could hardly have intended in § 69 to employ the statutory maximum hours as synonomous with regular working hours as there is no prohibition on regular working hours that are longer than the statutory maximum. His illustrations, numbers 2 and 3, show that overtime premiums may be earned within the first 40 hours of a workweek. The statutory maximum hours are significant only as requiring overtime premium pay. An employer

is that such a method of computation would give an improperly weighted average for the rate of pay for the entire week; an employee who performed more highly skilled or unpleasant work after 40 hours of work would not receive the proper amount of statutory excess compensation if the regular rate were computed only on the basis of the first 40 hours. The statement as to statutory excess hours in Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 423, was made as to a situation where this Court concluded the dual payplan of the case was "wholly unrealistic and artificial . . . so as to negate the statutory purposes." The problem we are here considering was not at issue.

The question is sufficiently shown by this excerpt: "Extra compensation paid for overtime work, even if required to be paid by a union agreement or other agreement between the employer and his employees need not be included in determining the employee's regular hourly rate of pay (see par. 13 of this bulletin). Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as compensation for overtime work—that is, for hours worked outside the normal or regular working hours—regardless of whether he is required to pay such compensation by a union or other agreement." Interpretative Bulletin No. 4, United States Department of Labor, Wage and Hour Division, Office of the Administrator, revised November 1940.

may increase pay or decrease hours free as to those steps from statutory regulation. See article in Monthly Labor Review, supra. The trial court pointed out that "The identifying mark of the case at bar is the absence of any norm, any regularity. Both parties have emphasized the casual, irregular character of the employment." 69 F. Supp. 959-60. The trial court, as we have heretofore stated, p. 9, also found that the "basic working day," defined by § 2 (a) of the agreement set forth in note 5, supra, was not the day normally, regularly or usually worked by respondents. Indeed the contract, § 1, required these round-the-clock irregular hours from some individuals." We call attention to the problem only to lay it aside as inapplicable in this case.

However, the government contends in this case that regular working hours are important, that the contract fixed regular working hours as the straight time hours and that as an actual fact as shown by the statistics of concentration of work in straight time hours, p. 9 supra, the straight time hours were the regular working hours of all longshoremen. The government concludes from this that the contract straight time pay is the regular rate of pay and the contract overtime pay includes a true overtime premium. We may be mistaken in thus limiting the government's argument on this point. If the government means that any extra pay to an employee for work outside regular working hours of the group of employees is to be excluded from the computation of the regular rate, we do not think that contention sound. The defect in this argument, however the government's position is construed, is that it treats of the entire group of longshoremen instead of the individual workmen. respondents here. The straight time hours can be the regular working hours only to those who work in those hours. The work schedule of other individuals in the same general employment is of no importance in determining regular working hours of a single individual.

As a matter of fact, regular working hours under a contract, even for an individual, has no significance in determining the rate of pay under the statute. It is not important whether pay is earned for work outside of regular working hours. The time when work is done does not control whether or not all or a part of the pay for that work is to be considered as a part of the regular pay.

We think, therefore, that this case presents no problems that involve determination of the regular hours of work. As an employment contract for irregular hours the rule of dividing the weekly wage by the number of hours worked to find the regular rate of pay would apply. Cf. Overnight Motor Co. v. Missel, supra, at 580.

(3) The contract was interpreted by the Shipping Association and the Longshoremens Association as providing that the contract straight time was the regular rate. The parties to the contract indicated by their conduct that the contract overtime was the statutory excess compensation or an overtime premium. Finding 43, 162 F. 2d at 672; see note 33 infra. Apparently no dispute or controversy arose over this interpretation although the contract, \$19, made provision for the resolution of such disagreements. The trial court determined that the straight time hourly rate was the regular rate at which respondents were employed. This construction by the parties and the court's conclusion, supported by evidence, leads us to consider this agreement as though there was a

³¹ As a matter of fact in half of the cargo classifications, the overtime rate was a few cents less per hour than time and a half the straight time rates.

³² Conclusion of Law No. 3: "The 'straight time hourly rate' set forth in each subdivision of Paragraph 4 of the Collective Agreement, as stated in Finding of Fact No. 9, constituted the regular rate at which plaintiffs were employed when handling the stated kind of cargo."

paragraph which read to the effect that the straight time rate is the regular rate of pay. We should also consider that the contract provided that the contract overtime rates were intended to provide any statutory excess compensation, when men worked more than forty hours except in those situations where the entire time, including the excess, was in the straight time hours." This of course does not mean that respondents here were familiar with these purposes of the agreement. So far as the record shows, they worked for the pay promised under the words of the contract. It shows nothing more on this point.

Under the contract we are examining, the respondents' work in evertime hours was performed without any relation as to whether they had or had not worked before. Under our view of § 7 (a)'s requirements their high pay was not because they had previously worked but because of the disagreeable hours they were called to labor or because the contracting parties wished to compress the regular working days into the straight time hours as much as possible. As heretofore pointed out, we need not determine what were the regular working hours of these respondents. If it were important, the trial court determined that their regular working hours were not the straight time hours. They worked at irregular times, Finding 45, 162 F. 2d at 672. The record shows that all respondents worked 5,201 straight time hours and 20,771

M It is clear under the applicable section of the agreement, § 2 (a), note 5 above, that a man could work all his time wholly in contract overtime hours. An employee received overtime premium for work done in what the trial court considered to be the basic workweek. Finding 43 (a): "If, and only if, a longshoreman worked more than 40 hours between 8 a. m. and 12 noon, and 1 p. m. and 5 p. m. on Mondays to Fridays, inclusive, and between 8 a. m. and 12 noon on Saturday of that workweek, none of these days being a. holiday, he was paid an additional sum for work on Saturday morning in excess of 40 hours—namely 621/2 cents per hour, ..."

overtime hours. Four of the twenty respondents worked no straight time hours. Five others worked less than 100 straight time hours. Three worked more straight time than overtime. The record does not show the hours these respondents worked for other employers. That fact is immaterial in this case as respondents seek recovery only from petitioner employers. These round-the-clock hours were in strict accordance with the contract which allowed the Longshoremens Association to furnish all men needed and called for the men to "work any night of the week, or on Sundays, holidays or Saturday afternoons when required." \$\$ 1 and 2; see note 5. Men who worked contract overtime hours were entitled to contract overtime pay. They were given no overtime premium pay because of long hours. It is immaterial that his regular rate may greatly exceed the statutory minimum rate. This contract overtime rate, therefore, did not meet the excess pay requirements of § 7.

In finding the statutory excess compensation due respondents, the trial court must determine the method of computation. Each respondent is entitled to receive compensation for his hours worked in excess of forty at one and a half times his regular rate, computed as the weighted average of the rates worked during the week. In computing the amount to be paid, the petitioners may credit against the obligation to pay statutory excess compensation the amount already paid to each respondent which is allocable to work in those excess hours. The preeise method for computing this credit presents the difficulty. According to the Administrator's interpretation, an employer may credit himself with an amount equal to the number of hours worked in excess of forty multiplied by the regular rate of pay for the entire week rather than an amount equal to the number of hours worked in excess of forty multiplied by the average rate of pay for

those excess hours.** Under that formula each respondent is entitled, as statutory excess compensation, to an additional sum equal to the number of hours worked for one employer in a workweek in excess of forty, multiplied by one-half the regular rate of pay. On the record before us, that interpretation seems to be a reasonable one; we leave a final determination of the point to the District Court on further proceedings.

The Circuit Court ordered the case remanded to the District Court for determination of the amounts due respondents in accordance with its opinion. By a further order, it allowed the District Court to consider any matters presented to it by petitioners as a defense in whole

If it were held that an employer, under the contract we are here considering, could credit himself only with the wages actually paid during the hours following the first 40, an employee who performed 40 hours of contract overtime work early in the week and 10 hours of straight time after the first 40 hours would receive a larger award than an employee who first worked 10 straight time hours and then worked 40 contract overtime hours. Such a variation in the amount of statutory excess compensation would not be in accord with the statutory purpose.

Compare, however, Releases 1913 and 1913 (a) issued by the Administrator on December 1, 1942 and January 5, 1943, which provide that an employer may if he so elects compute the regular rate on the basis of the number of hours worked in excess of 40. If that method of computation of the regular rate is followed, an employer could credit himself with, the wages actually paid during the hours in excess of 40.

See Interpretative Bulletin No. 4, § 14. The Administrator illustrates his position with the following example: an employee works 30 hours a week at an occupation paying 40 cents an hour and 20 hours in the same week at an occupation paying 50 cents an hour. The employee's regular rate of pay is 44 cents an hour (30 hours×40 cents+20 hours×50 cents+50 hours), and he is entitled to receive \$2.20 in addition to the \$22 he has already received, equal to the number of overtime hours (10) multipled by one-half the regular rate of pay (22 cents).

or in part under the Portal to Portal Act. We modify these orders so as to permit the District Court to allow any amendments to the complaint or answer or any further evidence that the District Court may consider just.

As so modified the judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice Douglas took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 366-367.—OCTOBER TERM, 1947.

Bay Ridge Operating Co., Inc., Petitioner,

366 v.

James Aaron, Albert Alston, James Philip Brooks, et al.

> Huron Stevedoring Corp., Petitioner.

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Leo Blue, Nathaniel Dixon, Christian Elliott, et al. On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 7, 1948.]

Mr. Justice Frankfurter, with whom Mr. Justice Jackson and Mr. Justice Burton concur, dissenting.

No time is a good time needlessly to sap the principle of collective bargaining or to disturb harmonious and fruitful relations between employers and employees brought about by collective bargaining. The judgment of Congress upon another doctrinaire construction by this Court of the Fair Labor Standards Act ought to admonish against an application of that Act in disregard of industrial realities. Promptly after the Eightieth Congressconvened. Congress proceeded to undo the disastrous decisions of this Court in the so-called portal-to-portal cases. Within less than a year of the decision in Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, both Houses, by overwhelming votes that cut across party lines, passed, and the President signed, the Portal-to-Portal Act of 1947. What is most pertinent to the immediate problem before us is the fact that because the Fair Labor Standards Act had been "interpreted judicially in disregard of long established customs, practices and contracts between em-

ployers and employees," Congress had to undo such judicial misconstruction because it found that "voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and employees and employees and employees would be created." Because the present decision is heedless of a long-standing and socially desirable collective agreement and is calculated to foster disputes in an industry which has been happily at peace for more than thirty years, I deem it necessary to set forth the grounds of my dissent.

The Court's opinion is written quite in the abstract. It treats the words of the Fair Labor Standards Act as though they were parts of a cross-word puzzle. They are. of course, the means by which Congress sought to eliminate specific industrial abuses. The Court deals with these words of Congress as though they were unrelated to the facts of industrial life, particularly the facts pertaining to the longshoremen's industry in New York. The Court's opinion could equally well have been written had the history of that industry up to 1916 not been an anarchic exploitation of the necessities of casual labor for want of a strong union to secure through equality of bargaining power fair terms of employment. See, e. q., Barnes, The Longshoremen (1915), passim. Through such bargaining-power the agreement was secured which the Court now upsets. Through this agreement, the rights and duties of the industry—the members of the union on the one hand and the employers on the other hand-were defined, and the interests of the men, the employers, and, not least, the community were to be adjusted in a rational and civilized way. On behalf of a few dissident members of the union, but against the protests of the union and of the employers and of the

¹ Section 1 (a), Portal-to-Portal Act of 1947, 61 Stat. —, 29 U.S. C. § 251 (a).

Government, the Court dislocates this arrangement and it does so by what it conceives to be the compulsions of § 7 (a) of the Fair Labor Standards Act.² This is to attribute destructive potency to two simple English words—"regular rate"—far beyond what they deserve.

Employment of longshoremen has traditionally been precarious because dependent on weather, trade conditions, and other unpredictables. Decasualization of their work has been their prime objective for at least sixty years. They have sought to achieve this result by inducing concentration of work during weekday daytime hours.

One of the strongest influences to this end is to make, it economically desirable. And so the union has sought and achieved an addition to the basic—the regular—rate sufficiently high to deter employers from assigning work outside of defined periods, except in emergencies. Since 1916, when the International Longshoremens Association made its first collective agreement with waterfront employers in New York, a 50% premium on night and weekend work has generally prevailed. In the industry, this has been colloquially called "overtime" pay.

Longshoremen do not usually work continuously for one employer, but shift from one to another, wherever employment can be found. The Fair Labor Standards Act does not entitle an employee who works a total of over forty hours per week for several employers, but not more than forty hours for any one of them, to any overtime pay. In view of the peculiarities of this industry, therefore, the only effective way of promoting the aim of the

a "No employer shall ... employ any of his employees ... for a workweek longer than forty hours ... unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1060, 1063, 29 U. S. C. § 207 (a).

Fair Labor Standards Act, to deter a long workweek, is that devised by the collective agreement, namely, to limit to approximately the statutory maximum of hours thetotal length of the periods in the week for which additional pay amounting to overtime rates need not be paid, regardless of the employer for whom the work is done.

During the period (1943-45) in controversy, the wage rates were governed by the 1943 General Cargo Agreement between the International Longshoremens Association and the employers at the Port of New York. Under its terms, the "basic working week," for which "straight time" hourly rates were paid, included the hours of 8 a.m. to noon, and 1 p. m. to 5 p. m., Monday through Friday, and 8 a.m. to noon an Saturday. "Overtime" rates, for "all other time," were in almost all instances 150% of the "straight time" rates. The 1943 Agreement em-

³ "2 (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

[&]quot;(b) Meal hours shall be from 6 a. m. to 7 a. m., from 12 Noon to 1 p. m., from 6 p. m. to 7 p. m., and from 12 Midnight to 1 a. m.

[&]quot;3 (a) Straight time rate shall be paid for any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday.

[&]quot;(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

[&]quot;(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the ment are relieved. . . "

^{*}For purposes of this case, the "overtime" rate may be regarded as 150% of "straight time" in all instances, since the District Court allowed the respondents to recover for those few instances where the "overtime" was slightly less, and this portion of its judgment was not appealed.

bodied the practice of the industry since 1916, whereby. approximately 150% of "straight time" rates was paid for night and weekend work. Through the years, with successive renewals of agreements between the International Longshoremens Association and the employers, the rates of pay have risen and the length of the "basic working week" has decreased. The respondents, members of the International Longshoremens Association, did a large part of their work for the petitioners outside of the enumerated "straight time" hours. In accordance with the collective agreement, they received, for whatever work they did during the "basic working week," "straight time" pay, and for work at all other times, "overtime" pay, drawing such "overtime" pay regardless of whether such work was or was not part of their first forty hours of work in the week.5 They instituted this action, for double damages under § 16 (b) of the Fair Labor Standards Act, 52 Stat. 1060, 1069, 29 U.S.C. § 216 (b), asserting that night and weekend work had been so frequent an incident of their employment that the contractual "straight time" pay could not be deemed their "regular rate" of pay, under § 7 (a), but that their "regular rate" was the average of what they received for all their work for any one employer, "straight time" and "overtime" together. On this theory, rejected by the union, the employers, and the Government, but now accepted by the Court, all work beyond forty hours per week for any one employer should have been paid for at one and one-half times this average.

The statutory phrase "regular rate" is not a technical term. Thirteen expressions used in the Fair Labor Stand-

To On the other hand, although the contract did not so specify, in the unusual situation of a longshoreman working over forty hours of "straight time" for one employer in one week, he was paid time and a half for the excess. Where this had not been done, the District Court allowed appropriate recovery, and this was not appealed.

ards Act were defined by Congress in § 3. "Regular rate" was left undefined. The legislative history of the phrase reveals only that it replaced "agreed wage" in an earlier draft, but there is no indication that this modification had significance. Nor is there any indication that in the field of labor relations, "regular rate" was a technical term meaning the arithmetic average of wages in any one week. If ordinary English words are not legislatively defined, they may rightly be used by the parties to whom they are addressed to mean what the parties through long usage have understood them to mean, when the words can bear such meaning without doing violence to English speech. The "regular rate" can therefore be established by the parties to a labor agreement, provided only that the rate so established truly reflects the nature of the agreement and is not a subterfuge to circumvent the policy of the statute. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424. Thus the problem before us is whether the designation of "straight time rates" for the "basic working week" in the longshoremen's collective agreement was an honest reflection of the distinctive conditions of this industry.

We are not concerned with an abstract "regular rate" of pay, for industry is not. The "regular rate" in a given industry must be interpreted in the light of the customs and practices of that industry. The distinctive conditions of the longshoremen's trade, where employees frequently work during one week for several different employers, are reflected in the provisions which the industry has made in determining rates of compensation. These provisions were designed to secure for longshoremen protection not only from harmful practices common to many industries and dealt with specifically by the statute, but also from those peculiar to the longshoremen's industry, requiring special treatment.

The respondents' wages, as part of a comprehensive arrangement for the betterment of the longshoremen's trade—also covering health and sanitary provisions, minimum number of men in a gang doing specified types of work, "shaping time," minimum hours of employment for those chosen at a "shape," arbitration, etc.—were determined by a collective agreement entered into between the union and the employers. The Fair Labor Standards Act was "intended to aid and not supplant the efforts of American workers to improve their own position by selforganization and collective bargaining." H. Rep. No. 1452, 75th Cong., 1st Sess., p. 9. "The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged. by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those lowwage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." Sen. Rep. No. 884, 75th Cong., 1st Sess., pp. 3-4. Such assurances were necessary to allay the traditional hostility of organized labor to legislative wage-fixing. The Court now holds unlawful a collective agreement entered into by

Similar intentions were expressed again and again in the Committee Hearings and on the floor of both Houses of Congress by the spokesmen of the Administration and Congressional Committee members. See the Joint Hearings before the Senate Committee on Labor and Education and the House Committee on Labor, 75th Cong., 1st Sess., pp. 46-47 (Asst. Atty. Gen. Jackson); id. pp. 181-83 (Secy. Perkins and Sen. Walsh); 81 Cong. Rec. 7650, 7651, 7808 (Sen. Black); 7652, 7799, 7800, 7885-86, 7937 (Sen. Walsh); 7813 (Sen. Pepper); 82 Cong. Rec. 1390 (Rep. Norton); 1395 (Rep. Randolph); 83 Cong. Rec. 7291 (Rep. Allen); 7310 (Rep. Fitzgerald); 9258 (Rep. Randolph).

a strong union, governing the wide range of the longshoremen's employment relationships, and especially designed to restrict the hours of work and to require the same premium as that given by the statute for work done outside of normal hours but within the statutory limit. The Court substitutes an arrangement rejected both by the union and the employers as inimical to the needs of their industry and subversive of the process of collective bargaining under which the industry has been carried on. But, we are told, these untoward consequences are compelled by a mere reading of what Congress has written.

On the question you ask depends the answer you get. If the problem is conceived of merely as a matter of arithmetic you get an arithmetical answer. If the problem is put in the context of the industry to which it relates. and meaning is derived from an understanding of the problems of the industrial community of which this is just one aspect, a totally different set of considerations must be respected. The defendants derived their rights from the entire agreement and not from a part mutilated by isolation. If the parties had written out with unambiguous explicitness that the extra wage in the scheduled periods is to be deemed a deterrent against work during those periods and is not to be deemed a basis for calculating time and a half after the forty hours. I cannot believe that this Court would say that such an agreement, made in palpable good faith, is outlawed by the Fair Labor Standards Act.

How is compensation for services above the limits set by the Act to be reckoned? The standard for compensation could be determined (1) by specific statutory terms; (2) by collective agreement; or (3) by judicial construction in default of either.

Congress could have laid down a hard and fast rule, could have expressed a purely arithmetic formula. It could have said that the rate on which time and a half

is to be reckoned is to be found by dividing the total wage, by the hours worked. It would not even have been necessary to spell all this out. Congress could have conveyed its thought by using the phrase "average" instead of "regular." And where we have nothing else to go on, except the total wage and the hours, it is reasonable enough thus to ascertain the regular rate. But when parties to a complicated industrial agreement, with full understanding of details not peculiarly within the competence of judges. indicate what the regular rate is for purposes of contingencies and adjustments satisfied otherwise than by a purely arithmetic determination of the rate of wages; nothing in the history of the law or its language precludes such desirable consensual arrangements, provided, of course, that the parties deal at arms length, and that the defined "regular" rate is not an artifice for circumventing the plain commands of the law. Such an artifice would obviously not be used in a contract made by workers in their own interests represented by a union strong enough to pursue those interests. Regularity in this context implies of course a controlling norm for determining wages which, though agreed upon between the parties, is consistent with, and not hostile to, the underlying aims of the overtime provision of the Fair Labor Standards Act. Discouragement of overwork and of underemployment are the aims. The longshoremen's collective agreement serves the same purpose as does the statute.

The Fair Labor Standards Act is not a legislative code for the government of industry. It sets a few minimum standards, leaving the main features in the employment relation for voluntary arrangement between the parties. Where strong unions exist relatively little of the employment relation was to be enforced by law. Most of it was left to be regulated by free choice and usage as expressed and understood by the unions and employers. Congress did not provide for increase in basic rates except to the

limited extent of establishing minimum wages. The inclusion of such minimum wages is in itself a recognition by Congress of the distinction between what it sought to change and what it sought to use only as the basis for the computation of an overtime percentage.

The claim of the few members in opposition to the union is predicated upon as amount superadded for reasons peculiar to the stevedoring industry to the wage which the parties to the agreement in perfect good faith established as the regular rate. The union members secured this extra wage as part of the entire scheme of the collective agreement.7 This premium is not to be detached from the scheme as though it were a rate fixed by law as a basis for calculating the statute's narrowly limited overtime provision. So long as its minimum wage provisions were complied with, the statute did not seek to change the true basic or "regular" rate of pay in any industry, from which rate all statutory overtime is to be computed. There is no justification for interpreting the statutory term as including elements clearly understood in the industry to be as foreign to the "regular rate" as any strictly overtime rates. Here the extra wage is the industry's overtime rate for work which might not be within the overtime period of the Fair Labor Standards Act, but was within the schedule of the collective agreement for extra wages, not because the work was overtime in the ordinary industrial sense but because it was at periods during which all work was sought to be discouraged by making it costly. Because the union secured for its men an extra wage even for not more than forty working hours, the scope of the Fair Labor Standards Act

⁷Cf. Lord Stowell, in *The Neptune*, 1 Hagg. Adm. 227, 232: "... the natural and legal parents of wages are the mariner's contract, and the performance of the service covenanted therein; they in fact generate the title to wages."

as to overtime is not enlarged. Only for a work-week longer than forty hours is an employee to be paid one and a half times "the regular rate," and nothing in the Act precludes agreement between the parties as to what the regular rate should be, provided such agreement is reached in good faith and as a fair bargain. The presupposition of the Act was that voluntary arrangements through collective bargaining should cover an area much wider, and economically more advantageous, than the minimum standards fixed by the Act. The traditional process of collective bargaining was not to be disturbed where it existed. It was to be extended by advancing the economic position of workers in non-unionized industries and in industries where unions were weak, by furthering equality in bargaining power. It certainly was not the purpose of the Act to permit the weakening of a strong union by eviscerating judicial construction of the terms of a collective agreement contrary to the meaning under which the industry had long been operating and for which the union is earnestly contending.

There can be no quarrel with the generality that merely because the conditions of employment are arrived at through collective bargaining an arrangement which violates the statute need not be upheld. But this does not mean that in determining whether the contractual designation of certain hours as "basio" is honest and fair, we cannot consider the fact that the contract was one entered into by a powerful union, familiar with the needs of its members and the peculiar conditions of the industry, and fully equipped to safeguard its membership. To view such a contract with a hostile eye is scarcely to carry out the purpose of Congress in enacting the Fair Labor Standards Act.

This Court has sustained the power of "employer and employee . . . to establish [the] regular rate at any

point and in any manner they see fit," Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424, provided that the regular rate is not computed "in a wholly unrealistic and artificial manner so as to negate the statutory purposes." Walling v. Helmerich & Payne, 323 U.S.. 37, 42. If we were confronted with an agreement which did not reflect the true practice in the industry, if despite the designation of certain hours as "basic" and others as "overtime," the distinction was not actually observed, but work was done at all times indiscriminately, so that what the contract designated as "overtime" pay was in reality a "shift differential." designed to induce employees to work at less pleasant hours, rather than to deter employers from carrying on at such hours, the labels attached by the parties to the various periods of work would not be allowed to conceal the true facts. We have again and again pierced through such deceptive forms. See, e. g., Walling v. Helmerich & Payne, 323 U. S. 37; Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419; Walling v. Harnischfeger Corp., 325 U. S. 427; 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199. here there is no suggestion that the agreement mislabeled the true circumstances of the employment relationship. And it is significant that in no case in which we found that the terms used had distorted the true facts did a. union which had made the contract appear to defend it.

The fact that some work was done at odd hours does not misrepresent the regular situation, provided that such work was exceptional and was restricted in frequency by the overtime provisions of the agreement, so that what the agreement treated as regular and what as exceptional were truly just that. We turn then to the actual experience, in representative periods, of the Port of New York longshoremen. The stipulations, exhibits, and findings of the District Court, all demonstrate the exceptional

nature of "overtime" work. It is also apparent that such night work as was done was usually done in addition to, rather than instead of, daytime work. The increased compensation for such work therefore served principally to achieve the same result as did the statute—namely, to afford a higher rate of compensation for long hours. In peacetime, night work was extremely rare for anyone as a recurring experience, and even during the exigencies of war only a small minority was principally so occupied.

The accuracy of the designation of one period or amount of work as "basic" is not contradicted by the fact that some work may have been done at other times as well. The very reference in any collective agreement to overtime pay for unusual hours implies that some such work is anticipated. A protective tariff need not be so high as to exclude every last item. The statistics in the margin amply justify the trial judge's conclusion that the designations in the collective agreement were not unreal or artificial when the agreement was entered into, and did not become so even at the height of the abnormal wartime effort.

The following figures were either stipulated by the parties, found as facts by the District Court and concurred in by the Circuit Court of Appeals and this Court, or computed from such statistics:

•	1932-37 a v- erage	Oct. 24, 1938 (effective date of FLSA) to Aug. 31, 1939 (eve of war)	Apr. 1, 1944– Mar. 31, 1945 (height of war- time activity)
	1 1	4-4	
Work performed during straight time hours	79. 93%	- 75.03%	
Night work	15. 13%		
Weekend work	4.94%	7.08%	25.0%
lotal night work by men who had worked			
during same day	13. 2%	23. 29%	44. 9%
Ditto by those who had not		76.71%	55, 5%
l'otal man-hours, consisting of night work by	86.8%		
those who had not worked during same day	2. 57%	4.17%	11.1%
Concentration of man-hours, straight time			. 0
over overtime	11, 22	8.47	1.
			. 50

Of course, even if most of the work of longshoremen was performed during "straight time" hours, if the 50% increment for work at other times was not a true overtime payment, but a shift differential, this higher rate of pay would have to be taken into account in establishing the "regular rate" of the respondents. But the District Court found that this premium constituted true overtime. As that court stated (Finding 28), a shift differential

"is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts,"

while a true overtime premium

designed to inhibit or discourage an employer from using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50% of the normal rate."

These findings of the District Court are amply supported by the testimony and by industrial statistics. See 65 Monthly Labor Review 183-85; Wage Structure: Machinery (Bureau of Labor Statistics 1945) p. 21; id. (1946) p. 38; Wage Structure: Foundries (Bureau of Labor Statistics 1945) Tables 32, 33; id. (1946) pp. 44-45. And compare the Directives of the Economic Stabilization Director dated March 8, 1945, and April 24, 1945, limiting the shift differentials which the National War Labor Board could approve to four cents per hour for the second shift and six or eight cents per hour for the third. CCH Labor Law Service, vol. 1A, ¶¶ 10,034.11, 10,462. Apply-

ing the test based on Finding 28, and finding also that the differential had in fact served to deter night and week-end work, the District Court held that the fifty per cent increment was true overtime and not a shift differential.

The Court purports to accept the findings of the District Court, and yet it concludes that the District Court erred in finding that the fifty per cent was by way of overtime and not a shift differential. The District Court, to be sure, did not explicitly state that the premium was not a shift differential in one of its formal Findings of Fact. It did so state, however, in its opinion and this conclusion depended on the statements quoted above from Finding 28 as to the characteristics indicative of true overtime and shift differentials. I fail to see how this Court can accept Finding 28 and reject the conclusion that the contractual "overtime" was not a shift differential.

Findings of lower courts are to be disregarded only if not substantiated by the evidence. Here, the evidence supporting the finding was impressive, and yet the Court strains to overturn it to reach a result not urged as socially desirable but only as demanded by legal dialectic.

The Court holds that even if the collective agreement accurately designated the regular and overtime work of the generality of longshoremen, it cannot apply to the respondents, because of their particular working hours for a stretch of the wartime period here in controversy.

That the hours designated by the agreement as "overtime" were regarded by the union as excessive hours, rather than merely as unpleasant hours, may also be deduced from the fact that they included much weekday time in which there was ample daylight during a large part of the year, and were not confined to nights and weekends. Another indication of the same thing is the fact that the history of the union agreements for New York longshoremen reveals a succession of reductions of the total number of "straight time" hipurs parallel to the reduction of the usual weekly working hours during the same period throughout American industry,

This contention expresses an attitude toward the process of collective bargaining which, if accepted, would undermine its efficacy. It subjects the collective agreement to the hazards of self-serving individualism, which must inevitably weaken the force of such agreements for improving the conditions of labor and forwarding industrial peace. Here, the very increased rates of pay which the respondents received for exceptional night and weekend work was the result of the contract which they now seek to disavow.

Collective bargaining between powerful combinations of employers and employees in an entire industry, each group conscious of what it seeks and having not merely. responsibility for its membership but resourceful experience in discharging it, is a form of industrial government whereby self-imposed law supplants force. Cf. Feis, The Settlement of Wage Disputes (1921) c. II. This is an accurate description of the process by which the stevedoring industry has served the greatest port in the United States. Yet the Court rejects the meaning which the parties to the agreement have given it and says it means. what the parties reject. Often, too often, industrial strife is engendered by conflicting views between employers and employees as to the meaning of a collective agree-Here the industry as an entirety—the union and the employers' association—is in complete accord on the meaning of the terms under which the industry has lived for thirty years and under which alone, the parties to the agreement insist, they can continue to live peacefully. But a few members of the union assert an interest different from that of their fellows some thirty thousand—and urge their private meaning even though this carries potential dislocation to the very agreement to which they appeal for their rights. Unless it be judicially established that union officers do not know their responsibility or have betrayed it, so that what appears to be a contract on behalf of their men is mere pretense

in that it does not express the true interests of the union as an entirety, this Court had better let the union speak for its members and represent their welfare, instead of reconstructing, and thereby jeopardizing, arrangements under which the union has lived and thrived and by which it wishes to abide.¹⁰

Collective agreements play too valuable a part in the government of industrial relationships to be cast aside at the whim of a few union members who seek to retain their benefits but wish to disavow what they regard as their burdens. Unless the collective agreement is held to determine the incidents of the employment of the entirety for whom it was secured, it ceases to play its great role as an instrument of industrial democracy. Cf. Rice, Collective Labor Agreements in American Law, 44 Harv. L. Rev. 572; Wolf, The Enforcement of Collective Labor Agreements: A Proposal, 5 Law & Contemp. Prob. 273; Hamilton, Collective Bargaining, 3 Encyc. Soc. Sci. 628, 630.

But furthermore, as I read the Court's opinion, it is not limited in application to those employees most or all of whose work was done at night, but extends equally to those who worked chiefly during the "basic working week," but also did a few hours of work at other times. Even where a longshoreman worked precisely forty hours of "straight time," followed by a few hours of "overtime" in the same week, payment of the appropriate wages as

¹⁰ Of course, if it can be shown that particular employees—for reasons of color, lack of seniority, or anything else—were not fairly or properly represented in the collective bargaining agreement, and were discriminated against and forced into a less desirable class of work, not because of accident or their own desire but because of the deliberate policy of the employers, the union, or both, we cannot treat the agreement made for the generality of longshoremen as binding upon them as well. See Steele v. Louisville & N. R. Co., 323 U. S. 192; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210. The respondents' claim was not based upon any such allegation.

determined by the collective agreement would not satisfy the Court's test that only such extra pay as is given "for work because of previous work for a specified number of hours in the workday or workweek" " can be regarded as true overtime pay. To require specification in an industry where the only thing certain is uncertainty is to command the impossible. There is no justification for such a test in the statute, its history, industrial practice, judicial decision, or administrative interpretations."

In short, this is not a decision that where the predominant work of an employee is paid for at vovertime" rates, such rates enter into computation of the "regular rate," but rather that where the conditions in an industry are such that the number of "straight time" hours cannot be precisely predicted in advance, an arrangement for time and a half for all other hours cannot be legal, regardless of how unusual work outside of the "straight time" hours may be.

But whether or not the Court means to go as far as it seems to go, and even if its holding is later limited to the narrow situation now before us, I cannot agree with its conclusion. It seems to me that the "regular rate" of pay for Port of New York longshoremen was the "straight time" scale provided for by the union contract, and that this was true for the whole union, including the individual respondents. Far from receiving less overtime than the statute required, the respondents were, through the agreement, the recipients of much more. To call their demand one for "overtime pyramided on overtime" is not to use a clever catchphrase, but to describe fairly the true nature of their claim.

I would reinstate the judgments of the District Court.

¹¹ Italies supplied.

¹³ The Interpretations of the Wage-Hour Administrator pertinent to this case are conflicting and inconclusive. Citation of the most relevant should suffice. Cf. §§ 69, 70 (A) (6), Interpretative Bulletin No. 4, Wage and Hour Division, Department of Labor.

